

REPORTABLE (3)

JONATHAN MUTSINZE
v
THE ATTORNEY GENERAL, ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC et GUVAVA JCC
HARARE, JANUARY 22, MARCH 14,
SEPTEMBER 24 & OCTOBER 1, 2014

T. T G Musarurwa with him *A Mombasasa*, for the applicant

E Nyazamba, for the respondent

GARWE JCC:

[1] After considering the papers filed of record and hearing counsel, this Court issued the following order:

“It is ordered that:

1. The application for the trial of the applicant in case number CRB 8/2000 to be permanently stayed be and is hereby dismissed.
2. The matter is remitted to the trial judge at the High Court, Harare, for the reconstruction of the missing record, to include the reasons for conviction, proceedings and findings on the question of extenuation and thereafter for him to pass sentence.
3. The reasons for this order will follow in due course.
4. There be no order as to costs.”

[2] What follows are the reasons for the above order.

[3] Owing to the long and tortuous journey that this matter has trudged, it is necessary to set out the background in some detail, as such background explains, to a large extent, why this Court issued the above order.

FACTUAL BACKGROUND

- [4] In August 1998, the applicant and two other co-accused were arrested on allegations of murder and armed robbery committed at Chiwaridzo Bottle Store located at Chipadze Township, Bindura. They were placed on remand. Their application for bail was dismissed. The applicant has been in custody since then.
- [5] The criminal trial commenced sometime in September 2001 before Justice Hungwe and two assessors. The applicant, who was legally represented by *pro deo* counsel, initially Mr *Julian Colegrave* and thereafter Mr *Makuyana*, pleaded not guilty to two counts of murder. He however admitted taking part in the robbery in the company of two others, one of whom was armed. Evidence was led by both the State and defence. The defence case was closed on a date not known but either in 2003 or 2004.
- [6] In July 2013, the applicant filed the present application seeking a permanent stay of the criminal proceedings instituted against him and, as a corollary, an order releasing him forthwith from custody. He alleged that the failure by the State to complete his trial, ten years after the closure of the State case and fifteen years after his arrest, constituted a violation of his rights enshrined in s 50 and s 69 of the current Constitution.

PROCEEDINGS BEFORE THIS COURT

- [7] In his founding affidavit, the applicant averred that the record of the proceedings had gone missing together with the transcript of the proceedings. Attempts to reconstruct the record by the Registrar were unsuccessful.
- [8] Owing to the lengthy delay in the finalisation of his trial, the fact that the record of the proceedings had gone missing and the prejudice that he stands to suffer were a trial *de*

novo to take place, he prayed for an order permanently staying the criminal proceedings against him.

[9] On 22 January 2014, this Court sat to hear submissions on the application. The State advised the Court that it had not been possible to obtain an affidavit from the Registrar of the High Court explaining the status of the record of proceedings. By consent of both parties, the matter was postponed *sine die* and an order made for the Registrar of the High Court to file an affidavit, within thirty days, to clarify the status of the record and, if lost, the effort made to reconstruct the record. The Court also ordered the trial judge to furnish, through affidavit, the reasons for the delay in the finalisation of the matter.

[10] In response thereto, the Acting Registrar of the High Court of Zimbabwe advised, by affidavit, that the record as transcribed and the judge's note books had gone missing. The cassette tapes used to record the proceedings had been erased after the transcription and re-used in other cases. Whilst a number of documents had been availed to assist in the reconstruction, the record on the evidence led was not available.

[11] In his response, the trial judge, also by affidavit, stated that after the closure of the defence case and the hearing of closing arguments, he convicted the applicant on two counts of murder and one of robbery. One of the three accuseds had passed on before judgment. He acquitted the remaining accused. After hearing submissions on the question of extenuation, he made a finding that were no such circumstances as both counts of murder had been committed in cold blood and in the course of a planned robbery. On the record of the proceedings which has gone missing, he expressed the view, without substantiation, that the circumstances suggested collusion between the applicant and officers at the High Court to ensure that the matter was not concluded.

[12] The applicant, exasperated by what he considered were unfounded allegations made by the trial judge against him, in a supplementary affidavit, denied that he had ever been convicted and that the proceedings had been postponed so that sentence could be pronounced. He stated that nothing further had happened after the closure of the defence case. He denied the suggestion that he may have had anything to do with the disappearance of the record of the proceedings, citing lack of capacity on his part, owing to the fact that he has always been in custody.

[13] The matter was again set down before this Court on 12 March 2014. It became clear from the submissions made during that hearing that there was a dispute as to how far the matter had gone and whether it was still possible for the record of the proceedings to be reconstructed. The State however advised the Court that, at a meeting attended by both sides in the trial judge's chambers, the latter had indicated that he was able to reconstruct the record of proceedings using notes provided by the prosecution. Following this revelation, this Court again postponed the matter and issued another order directing the Registrar of the High Court to attend to the reconstruction of the record, within thirty (30) days, with the assistance of both the State and Defence counsel, the assessors and other officials who had a role to play in the criminal proceedings.

[14] Following upon the above order of this Court, a number of affidavits were filed:

14.1 *Faith Rutendo Matuku*, a legal process transcriber who transcribed tape numbers 11 to 22 (tape numbers 1-10 having been transcribed by Miss Mufakose – now late) stated in her affidavit that, as far as she recalls, the proceedings went as far as judgment and extenuating circumstances.

14.2 *Florence Ziyambi*, the trial prosecutor, stated that in 2003 the applicant and another accused were convicted of murder with actual intent after which submissions were made on the question of extenuation. The matter was then postponed for a ruling on the question of extenuation and passing of sentence. During the proceedings she took notes of all the proceedings. The notes were contained in three note books, which she marked I, II and III. Following the disappearance of the record, and, in order to assist with the reconstruction of the record, she availed the note books to the Acting Registrar of the High Court, a Mr Makomo. When she later requested for the notebooks, she received only the first two. The third, which contained notes on the judgment and submissions on extenuation, could not be located. She arranged for a transcription of the first two notebooks. A copy of that transcript has been filed with this Court.

14.3 *Tatenda Mawere*, who was a partner in the law firm representing the applicant, stated that, at the close of the state case, the applicant's counsel, Mr *Makuyana*, handed over the file to him as he was leaving the country to work at their Botswana office. He too had to shuffle between Zimbabwe and Botswana as he, like Mr *Makuyana*, was trying to make ends meet during the economic meltdown that gripped the country before dollarization. He handed all the files, including the applicant's, to a professional assistant working in the office. He stated that, so far as he can recollect, he was never advised to come to court for the verdict. Following the

filing of this application and after diligent search, the file could not be located in their office. He was unable to state categorically whether there had been a conviction.

14.4 *Munyaka Wadaira Makuyana*, who was the applicant's legal practitioner during the trial, confirmed that the file opened by the law firm in respect of the applicant had disappeared. He also confirmed that he had gone through the transcript prepared using the notes taken by Mrs Florence Ziyambi and that the transcript is a fair representation of what took place during the State case.

14.5 *Felix Makudza*, the investigating officer, confirmed that the transcript prepared using the notes made by Mrs Ziyambi correctly reflects the evidence he gave in Court.

14.6 *Zuze Zuze*, a state witness who gave evidence during the trial and was present at the time of the commission of the offences, also confirmed that the transcript correctly reflects the evidence he gave during the proceedings.

14.7 *Tatenda Mawere*, in a supplementary affidavit, confirms that the transcript prepared using the notes taken by Mrs Ziyambi is a correct reflection of what happened during the accused's person's evidence in chief.

[15] The application was then set down for hearing on 14 September 2014. At the hearing, both parties were agreed that the record of the proceedings transcribed with the assistance of the notes made by Mrs Ziyambi was accurate. However the parties were not agreed on whether or not the applicant had indeed been found guilty of murder and robbery and what remedy should follow.

[16] At the hearing, the applicant submitted that no guilty verdict had been returned. In the alternative, that even if there was such a verdict, a permanent stay would still be warranted as the record of the proceedings remains incomplete and no-one can say with any degree of certainty what transpired after the closure of the defence case.

[17] The State opposed the grant of a permanent stay, pointing out that the trial judge, the trial prosecutor, assessor and transcriber had all deposed to the fact that a verdict of guilty had been returned. Whilst accepting that there had been some prejudice owing to the delay in the finalisation of the matter, the State submitted that the interests of justice would be seriously prejudiced were the applicant to be set free, particularly in light of the fact that the trial judge had indicated that he was in a position to reconstruct the remaining portion of the proceedings. The State further submitted that the totality of the facts suggested that someone had gone to great lengths to ensure that the record was destroyed and that the only person who stood to benefit from the disappearance of the record is the applicant. To release him in these circumstances would set a dangerous precedent as it would encourage persons undergoing trial to arrange for the disappearance of the record of proceedings in the belief that they would ultimately get a permanent stay of the proceedings. In the circumstances, the State submitted that the Court should order the trial judge to reconstruct the missing part of the record and thereafter proceed to pass sentence. This Court then reserved judgment.

WHETHER THE APPLICANT WAS FOUND GUILTY

[18] Having considered all the circumstances of this case, the Court was satisfied that the appellant had, indeed, been convicted and that submissions on the issue of extenuation were made. Under oath, the trial judge stated that he convicted the

applicant of murder with actual intent and that, following submissions by both parties, he found no extenuating circumstances. In affidavits filed pursuant to an order of this Court, the legal process transcriber confirmed that the matter proceeded to the extenuation stage and that no extenuating circumstances were found. The trial prosecutor, Mrs Ziyambi, also by affidavit, confirmed that there was a conviction for murder although it appears she could not recall whether the issue of extenuation was determined. Moreover one of the assessors, Mrs Shava, also confirmed that indeed the applicant was found guilty of murder.

[19] Having taken into account all these documents, we were satisfied that the trial had indeed proceeded to the stage where the trial court made a finding that there were no extenuating circumstances. For some reason, which remains unclear, the actual sentence of death (which requires certain formalities) had not been passed.

WHETHER THE REMAINING PORTION OF THE RECORD CAN BE RECONSTRUCTED

[20] All the parties were agreed that the transcript of the proceedings that was prepared using Mrs Ziyambi's trial notes is correct. The transcript captures what happened during the trial proceedings up until the close of the defence case.

[21] In submissions before this Court, the State indicated that, at a conference held in the presence of both parties, the trial judge had indicated that he was in a position to reconstruct the remaining portion of the record of the proceedings.

[22] This Court therefore accepted, as a fact, that notwithstanding the various difficulties that had been encountered in trying to reconstruct the record, such reconstruction was possible. Moreover the circumstances surrounding the commission of the offences were not seriously in dispute. In the trial before the High Court, the applicant had admitted undertaking a journey from Marondera, in the company of

five others, to Bindura, with the sole purpose of committing acts of robbery and theft. He admitted going to Chiwaridzo Bottle Store in the company of one Evans and one Bonga and that he was aware that Evans was armed with a pistol. He admitted that, whilst in the company of Evans, he had participated in the robbery and had told the patrons to lie down on the floor. He accepted that when the deceased, Konje, confronted him saying the weapon they had was a toy and following an assault on him by Konje with a beer bottle, Evans had then fired the shot which killed the deceased. The applicant admitted that after this shot, he jumped over the counter and seized a cash box containing the day's takings.

A re-construction of the remaining portion of the record is therefore possible.

WHETHER THE APPLICATION FOR PERMANENT STAY IS WARRANTED

[23] The factors to be considered in an application of this nature are settled. These are (a) the length of the delay (b) the reasons given by the State for such delay (c) whether the applicant asserted his rights to a speedy trial and (d) the prejudice to the accused caused by the delay.

[24] In order to determine whether the delay is reasonable or not, a Court must endeavour to strike a balance between these factors. In general, no one factor can on its own justify an inference that the delay is unreasonable. The balancing test involves balancing the conduct of both the State and the accused on a scale –*S v Banga* 1995 (2) ZLR 297 (5); *In re Mlambo* 1991 (2) ZLR 399 (SC) 352 F-H.

I proceed to consider each of the factors in turn.

THE LENGTH OF THE DELAY

[25] At the time of the hearing of this application, the applicant had been in custody for approximately fifteen and a half years. He had been a convicted prisoner for about ten years. The delay was certainly inordinate and both parties to this application are agreed that the delay was, as far as we are aware, unprecedented and certainly presumptively prejudicial.

THE EXPLANATION FOR THE DELAY

[26] The reason for the delay has already been touched upon. The original transcript of the proceedings went missing in mysterious circumstances and the tapes used in the transcription were erased – also in unclear circumstances. The trial judge’s own handwritten record suffered a similar fate. The applicant’s legal practitioner’s file containing the notes made during the proceedings also disappeared without trace. When the Attorney –General’s Office availed three notebooks to the Acting Registrar in 2013, to assist in the reconstruction of the record, the third notebook – containing the notes on the judgment and submissions and findings on extenuation, also went missing. It was only after three orders of this Court that a transcript of the proceedings up to the stage of the close of the defence case was made available by the Registrar of the High Court and confirmed as correct by both the witnesses who gave evidence during the trial and the applicant’s erstwhile legal practitioners. Whilst it is by no means clear on the record before us as to when the transcript of the proceedings and the trial judge’s notes went missing, it is however apparent that the disappearance of the record largely contributed to the delay.

WHETHER THE APPLICANT ASSERTED HIS RIGHTS

[27] There is evidence that the applicant complained to at least three High Court judges about the delay after the year 2008. The first complaint was made to a judge during a prison visit. The other two were made during bail applications in the High Court. All were of the opinion that, since this was a matter where all the evidence had been heard by HUNGWE J, the issue of the delay was better dealt with by the trial judge. The referral of the complaint by these judges to HUNGWE J did not produce any results. Thereafter it was discovered that the transcript of the record of the proceedings as well as the judge's notes had both mysteriously gone missing.

[28] The applicant had been represented by *pro deo* counsel during the trial proceedings. It is common cause that his counsel thereafter left the country to work in Botswana but left the file at the offices of the law firm. The file was then re-allocated to a legal assistant in the law firm. What happened to it thereafter is unknown.

[29] Whilst I accept, as a general proposition, that a person who seeks a permanent stay of the criminal proceedings in which he is an accused, must assert his rights and that failure to do so will make it difficult for him to prove that he was denied a speedy trial, I am not convinced in this case that the applicant was in a position to do more than complain to the High Court judges. His lawyer, representing him *pro deo*, never demanded that this matter be determined. After the legal practitioner left the country, no other legal practitioner from the firm pursued the matter. It is moot whether the applicant received the best representation possible in the circumstances from his erstwhile legal practitioners.

[30] I think this Court can take judicial notice of the fact that the *pro deo* system in this country is not without difficulty. Usually it is the most inexperienced and junior

lawyers who are allocated these cases. It is only the few accused persons who are able to raise money to enlist the services of senior legal practitioners who are able to get appropriate legal representation required at this level. Therefore the fact that the applicant did not go further to assert his rights, though not irrelevant, should not be taken as sufficient justification for this Court to take too serious a view of such failure.

[31] In the above regard, it is important to bear in mind the remarks of KRIEGLER J in *Sanderson v Attorney – General*, Eastern Cape 1998 (2) SA 38 (CC), 53 E-G that:

“... one should not resort to the *Barker* test without recognising that our society and our criminal justice system differ from those in North America. Nor should one for instance adopt the “assertion of right” requirement of *Barker* without making due allowance for the fact that the vast majority of South Africans accused are unrepresented and have no conception of a right to a speedy trial. To deny them relief under s 25 (3) (a) because they did not assert their right would be to strike a pen through the right as far as the most vulnerable members of our society are concerned. It would be equally unrealistic not to recognise that the administration of our whole criminal justice system, including the law enforcement and correctional agencies, are under severe stress at the moment.”

[32] I am therefore of the view that although the applicant did not assert his rights in the sense in which the term is used, one must remain alive to the fact that he was represented by *pro deo* counsel, who eventually left the country for Botswana and no legal practitioner in the law firm considered it his responsibility to ensure that the matter was concluded. The failure by the applicant to assert his rights in these circumstances is not one that should weigh heavily against him.

WHETHER THE APPLICANT HAS BEEN PREJUDICED BY THE DELAY

[33] The question of prejudice is to be assessed in the light of the interests of the applicant which the speedy trial right was designed to protect. Three such interests have been identified by this Court: (a) to prevent oppressive pre-trial incarceration (b) to

minimise anxiety and concern on the part of the accused, and (c) to limit the possibility that the defence will be impaired – *Barker v Wingo* 407 US 514 (1972) at 530-532 cited with approval in *Fikilini v Attorney General (supra)*, at 112 and in *In re Mlambo (supra)* at 350 G-H – 351 A-B.

[34] The two questions of oppressive pre-trial incarceration and the possibility of impairment of the applicant in conducting his defence do not arise in the present matter. This is for obvious reasons. Once the applicant was found guilty and no extenuating circumstances found in 2003 or 2004, the question of oppressive pre-trial incarceration cannot therefore arise. So too is the consideration that the applicant would be impaired in conducting his defence, for there was no further evidence to be led or witnesses to be called.

[35] That the applicant must have suffered considerable anxiety for the duration of his incarceration cannot be doubted.

[36] In his affidavit, the applicant says the church that he had founded has collapsed, whilst two of his four wives have died of aids-related illnesses as they had to engage in sexual immorality to fend for themselves in his absence. His eldest son also committed suicide.

[37] As GUBBAY JA stated in *In re Mlambo (supra)*, at 344 B-C

“The right, therefore, recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health of the individual.”

[38] A court may quite properly infer or presume prejudice, where such is not proven - *In re Mlambo (supra)* at p 352F-G. In the Canadian case of *R v Askov* [1990], 2 S.C.R. 1199, 1232, CORY J remarked that there is a:-

“... general, and in the case of very long delays an often virtually irrefutable presumption of prejudice to the accused resulting from the passage of time.”

[39] In *Mills v The Queen* [1986] 1 SCR 863,919, para [145], another Canadian case, the concept of security of the person was said to encompass protection against:

“overlong subjection to the vexations and vicissitudes of a pending criminal accusation” which include:

“stigmatisation of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction. These forms of prejudice cannot be disregarded nor minimised when assessing the reasonableness of delay.”

THERE MUST BE GOOD REASON FOR A STAY TO BE GRANTED

[40] A further general principle that must be borne in mind in a case of this nature is that, whilst each case must be decided on its merits, the grant of a permanent stay is an exceptional remedy – *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* 2009 (3) ALL SA 491 (SCA); 2010 (2) SA 289 (SCA).

[41] In *Wells v Queen* [2010] VSCA 100, the Supreme Court of Victoria (Australia) accepted that it is only in an exceptional or extreme case that a court would grant a permanent stay on the basis that such proceedings constituted an abuse of process and that the test to be applied is:

“whether, in all the circumstances, the continuation of the proceedings *would* involve unacceptable injustice or unfairness’, or whether the continuation of the proceedings *would* be ‘so unfairly and unjustifiably oppressive’ as to constitute an abuse of process”.

[42] The power to stay proceedings permanently may be exercised:

“where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course” -

ICC 01/04-01/06-772, (Appeals Decision) para 30-31, *The Prosecutor v Thomas Lubanga Dyilo* (International Criminal Court), 14 December 2006.

[43] In Attorney General’s Reference (No.2 of 2001) [2003] UKHL 68, Lord Woolf stated:

“... if there has been prejudice caused to a defendant which interferes with his right to a fair trial in a way which cannot otherwise be remedied, then of course a stay is an appropriate remedy. But in the absence of prejudice of that sort, there is normally no justification for granting a stay.”

[44] In *Police v Sherlock* 2009 SASC 64, a decision of the Supreme Court of South Australia, the court cited with approval remarks that:

“The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor ... that the Court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court.”

The Court further added that:

“the power will be used only in most exceptional circumstances to order that a criminal prosecution be stayed”.

SOCIETAL INTEREST

[45] There will also always be the interests of society to be taken into account in any “balancing” of the factors that have been cited with approval by this Court since *Fikilini v Attorney-General (supra)*

[46] In *In re Mlambo (supra)* GUBBAY CJ cited with approval the remarks of CORY J in *R v Askov (supra)*, at p 1220 that:-

“...It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, effectively and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law.”

[47] In the *Askov* case (*supra*) (at pp 1219-20) CORY J discussed the “community or societal interest” in the following terms:-

“Community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest.”

DISPOSITION

[48] Whilst accepting, as one must, that the applicant has been in custody for an unconscionably lengthy period of time, it is clear, from what has been said before, that this was due mainly to the fact that the record of the proceedings mysteriously went missing and subsequent attempts to reconstruct the record were further frustrated after the documents that were to be used in such reconstruction also went missing.

The record was only reconstructed using two of three note books supplied by the trial prosecutor.

[49] The delay is clearly not the fault of the State. It is apparent that some unknown person, possibly with the assistance of persons working in the system, went to great lengths to ensure that the record of the proceedings was irretrievably lost. Whilst it will be unfair to suggest, as did the trial judge, that the applicant had anything to do with such disappearance it is, however, clear that the only person who stands to benefit from a situation where the record is irretrievably lost is the applicant.

[50] The facts of this case illustrate, as observed by GUBBAY CJ in *In re Mlambo (supra)*, that the system has shortcomings (at p 346B). The disappearance of the record could not have been avoided and, though occasioned by the activities of some unknown persons but who were obviously intent on making sure the record was permanently lost and that it could not be reconstructed, constituted a systemic delay. Indeed in *In re Mlambo (supra)* at 350 D-E GUBBAY CJ cited with approval the remarks by POWEL J in *Barker v Wingo (supra)* that:

“..... Finally, a valid reason, such as a missing witness should serve to justify appropriate delay.”

[51] In *Police v Sherlock (supra)*, the Supreme Court of South Australia accepted that obstacles to a fair trial may be encountered and that it is not always possible to achieve a perfect trial. The Court cited with approval remarks by MASON CJ in *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR, 23 that:

“Obstacles in the way of a fair trial are often encountered in administering criminal justice. Adverse publicity in the reporting of notorious crimes revelations in a public inquiry absence of competent representation, or the death or unavailability of a witness, may present obstacles to a fair trial; but they do not cause the proceedings to be permanently stayed. Unfairness occasioned by circumstances outside the court’s control does not

make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues. ...”

[52] In considering whether or not a permanent stay is warranted, this Court takes note of the following: that the applicant was convicted of murder committed with actual intent in the course of an armed robbery and that no extenuating circumstances were found to exist; that all that remained was the pronouncement of sentence; that the record of the proceedings up to the close of the defence case has, fortuitously, been reconstructed using note books provided by the trial prosecutor; that the disappearance of the record largely contributed to the delay; that the circumstances surrounding the commission of the offence were largely admitted by the applicant during the trial and finally that the trial judge is in a position to reconstruct the missing part of the record.

[53] Case law authority is agreed that it will be in rare cases where the destruction or disappearance of evidence will justify a permanent stay. The court must endeavour to reconstruct the record on the evidence available, despite any loss of documents or death of witnesses –see *R v Edwards* (2009) 83 ALJR 717; *Hodder v Public Transport Authority* [2009] WASC 293; *Police v Sherlock (supra)*; *Wells v R* [2010] VSCA 100; *Wells v R (No 2)* [2010] VSCA 294; *Aydin v R* [2010] VSCA 190; *S v Tandiwe Sibanda* HH 80/91.

[54] The lengthy delay experienced in the completion of this case, occasioned almost entirely by the suspicious disappearance of the record of the proceedings, cannot justify the grant of a permanent stay of the proceedings, particularly in light of the fact that such record of proceedings can be reconstructed.

[55] In light of the above, this Court was of the view that this was a proper case for the matter to be referred back to the trial court for the reconstruction of the missing part of the record and thereafter for sentence to be passed.

[56] Consequently, the court issued the order reflected in paragraph 1 of this judgment.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GOWORA JCC: I agree

PATEL JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

Mambosasa & Associates, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners