THE STATE
versus
CHARLES CALEB BONYONGWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 1 March 2017

Criminal Trial

H M Muringani, for the state
I T Chakawata, for the accused (*pro-deo*)

CHITAPI J: This matter was listed for trial today with the accused having been indicted on 2 counts of murder. Prior to the hearing, counsel made a courtesy call and I met with them in chambers. The accused's counsel had not previously appeared before me and took the opportunity to introduce himself as is customary. I enquired of counsel whether the matter was proceeding to trial as scheduled. The State counsel advised that he would apply for postponement of the trial for a number of reasons including the fact that he did not have state witnesses in attendance. I directed that the postponement be dealt with in an open court.

In court the State counsel applied for a postponement of the trial *sine die*. His reasons for seeking the postponement were that the State had failed to avail material evidence which the defence had requested for to enable defence counsel to properly prepare the accused's defence outline. The evidence sought was in nature of telephone records in respect of mobile phone line No. 0739 285 751 for the period 9 January, 2014 to 15 January, 2015. ZHOU J had previously postponed the trial to enable the State to provide the evidence. The evidence according to the State counsel was also vital to the State case because part of the evidence which the state proposed to rely upon were telephone calls allegedly made by the accused to certain State witnesses confessing to the murder of the two deceased persons which concern this trial. The State counsel submitted that he was unable to provide the evidence because the telephone service

provider had indicated that it does not keep records of telephone calls beyond 6 months. State counsel submitted that he now needed to reconsider the State papers and redo them by excluding evidence of telephone calls. He indicated that the accused would be reindicted on fresh papers.

State counsel further submitted that he did not have State witnesses in attendance. He cited Brian Utumbe, Charles Bonyongwe, Douglas Magwere, Never Taderera and Muhlekiwa Sumbulani Bonyongwe. It was submitted that these were key witnesses to the State case. Only one witness Trymore Mashonganyika was said to be on the way to court. The so called State witnesses were said to have been served by radio but there was no confirmation that the radio reached the witnesses. What is however clear to the court is that the State witnesses were not served with subpoenas to attend court today.

Mr *Chakawata* for the accused did not oppose the postponement. He submitted that the case had taken too long in taking off. He applied that the accused be removed from remand until such time as the State had put its house in order. The High Court is of course not a remand court and does not place or remove accused persons on or from remand. The High Court is a trial court. The accused persons are ordinarily placed on remand by the Magistrates Court pending their committal or indicting to the High Court for trial in cases where the State represented by the Prosecutor General decides that an accused is to be tried by the High Court on a charge for which he or she is appearing on remand in the Magistrates Court. In essence however, despite the confusion in the use of words and procedure, what Mr *Chakawata* really intended to achieve was to have the charges against the accused dismissed for want of prosecution.

I asked the State counsel to confirm whether or not the accused person had always availed himself since his indictment for trial before this court. State counsel confirmed so. In short therefore the accused has not been to blame for failure of the trial to commence.

Section 160 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows:

> **160 Bringing of accused persons to trial before High Court**
> (1) 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 Prosecutor-General has decided to prosecute before the High Court shall be brought to trial on such date as may be determined by the Prosecutor-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 Prosecutor-General.

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

It is therefore clear that subject to the proviso to subsection (2) of s 160 as aforesaid, the court is obliged to dismiss a case for want of prosecution if the accused is not brought to trial after the lapse of six months from the date of his committal or indictment by the magistrate for trial. The upshot of 160 is to provide that an accused committed for trial should be tried within 6 months of such committal. Such time lines are important to safe guard the accused person's rights to a fair hearing as postulated in s 69 (1) of the constitution (2013) which provides as a fundamental Human Right, the right of every person accused of an offence to be tried within a reasonable time before an independent and impartial tribunal whose proceedings should be conducted in public.

In passing I should note that bringing the indicted person to trial does not mean that the person should just appear before the High Court as happened in this case. The trial must actually commence. Once the trial has commenced the case can then be adjourned or postponed whether evidence has been led or not. What is envisaged by a trial commencing should be that the charge must actually have been put to the accused person. Section 166 of the Criminal Procedure and Evidence Act comes into play.

If the trial has not commenced but the accused has been indicted to the High Court for trial, the trial of the accused person is said to be pending from the date of service of the indictment. A pending trial can be postponed as may be expedient or necessary to another date on such terms as the court may determine. Further postponements of a pending trial are equally provided for. The powers of the court to postpone a pending trial are provided for in s 165 of the Criminal Procedure and Evidence Act. The power to postpone a pending trial is subject to limitations as to the duration of the postponement. In the case of the magistrates' court, the period of postponement is limited to 14 days at each postponement unless the accused consents to a longer period. In the case of the High Court the period of postponement pending trial commencement is not limited to but it is subject to the provisions of s 160 (2) in that the length should fall within the six month limit of the indictment unless the accused is not available

through circumstances beyond the control of the Prosecutor general like for example where the accused is indisposed and/or unfit to stand trial.

Turning to what transpired in this case, the sequence of events from the paper trail before me was as follows:

1. The accused first appeared in the magistrates' court for remand hearing on 17 January, 2014. From the request for remand form, the accused was alleged to have struck his wife and their son on their heads with an axe thereby causing their deaths.
2. The magistrates' court record of proceedings is CRB 105/14. It was forwarded to this court following the committal of the accused for trial. Inside the magistrates court record is a copy of the accused's confirmed warned and caution statement. It is not clear as to why a copy of the statement was filed of record. The statement is part of a police investigation and as such documentary evidence. As a matter of procedure, where the accused is brought before the magistrate for confirmation proceedings as envisaged in s 112 – 113 of the Criminal Procedure and Evidence Act, whether the statement is confirmed or not, it should be handed back to the prosecutor and should not be made apart of the record. It can only become part of the record when properly produced at trial stage.
3. The accused was remanded in custody and advised to apply for bail to this court on account of want of jurisdiction on the part of the magistrate to entertain a bail application on the murder charges.
4. The accused has remained in custody to this day. On 30 December, 2015, the accused was indicted for trial to this court. His trial date was given as 29 February 2016. It is important to bear in mind that the trial date is determined by the Prosecutor General as provided for in s 160 of the Criminal Procedure and Evidence Act. Reverting to the provisions of s 160 (2) of the Criminal Procedure and Evidence, the 6 months period for which the indictment would remain in force was therefore calculable from 1 January, 2016 because the reference to a month in an enactment is to be construed as a calendar month by virtue of the provisions of s 33 (b) (c) of the Interpretation Act, [*Chapter 1:01*]. The 6 months would therefore in this case expire on 30 June 2016.
5. From the record, the accused's case was on 3 March 2016 postponed *sine die* by ZHOU J. The trial had been set down for 5 days from 29 February 2016. The accused was not

called upon to plead to the charges. Nothing happened then until the matter was reset for hearing on 31 October 2016. The accused remained in custody. The trial did not commence on 31 October and according to a letter on record written by the accused's legal practitioners dated 28 October 2016 ZHOU J had postponed the case at the instance of the accused's counsel. The postponement was granted by consent of the State and the reason for the postponement was to afford the State sufficient time to obtain phone records already alluded to earlier on in my judgment. It was agreed that the matter would be re-set for trial after the State had obtained the records and supplied the defence counsel with copies thereof so that the defence counsel would in the words used in his letter aforesaid, "…. Complete our clients' defence outline and prepare for trial." According to the letter aforesaid, the matter was postponed in chambers.

6. Subsequent to the postponement in chambers, on 17 November 2016, a notice of set down of the trial for today, 1 March 2017 was prepared. This is how the matter came to be before the court today.

An analysis of the sequence of events clearly shows that when ZHOU J initially postponed the trial *sine die* on 3 March 2016, the accused's indictment was still in force. The State is the one which had the duty to reset down the matter for trial to commence. It was incumbent upon the Prosecutor General's office to keep track of the matter and ensure that the matter was dealt with before or at the latest on 30 June, 2016 which was the date that the indictment was going to lapse. The State Prosecutor sat on the matter and only reset it for hearing for 31 October 2016 which date was 4 months from the date of the lapse of the indictment.

It was confirmed by the prosecutor that the accused was always available for trial at all relevant times during the lifespan or validity of the indictment. The provisions of s 160 (2) enjoined the court to dismiss the case unless the failure to bring the accused to trial was due to his unavailability or other circumstance beyond the control of the Prosecutor General. When the matter was therefore brought before the court today, there was really no case properly set down for trial because the indictment had long lapsed.

The defence counsel on his part did not protect the accused's rights because post 30 June, 2016, he should have applied for the case to be dismissed on the basis of a lapsed or expired

indictment. Once a case is dismissed, then it means exactly that. The accused will be deemed not to have a case to answer to at that stage. The dismissal of the case necessarily means that the accused person is a free person. He cannot remain committed to custody on the basis of a dismissed case. Section 321 of the Criminal Procedure & Evidence Act 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."

It must follow therefore that the dismissal of a case following a lapsed indictment amounts to a dismissal for want of prosecution. I have read the judgment of my sister CHIGUMBA J in *Chanetsa Mhari* v *The Presiding Magistrate Mangoti N.O & Ors* HH 247/15. The judgment touches on important areas regarding the liberty of an accused person whose remand is refused vis-à-vis an accused whose case is dismissed; for want of prosecution. It is an instructive judgment which prosecutors and defence counsels should acquaint themselves with. I however will not dwell into it as is distinguishable to the extent that the learned judge was not dealing with the aftermaths of a lapsed indictment as envisaged in s 160 of the Criminal Procedure & Evidence Act.

When the prosecutor sought a postponement *sine die*, such relief on the facts and background of this case was not competent. The accused was not brought to trial within the period for which the indictment was in force. The court could not postpone a lapsed indictment. The prosecutor was therefore informed that he was free to bring the case back to court on a new indictment as envisaged in s 322 of the Criminal Procedure & Evidence. The accused was also advised of the provisions of the said section in terms of which the dismissal of the charges for lapse of the indictment was not to be viewed as an acquittal on the merits and that he could still be brought to court to answer the charges before the lapse of the prescription period which in this case was the lifetime of the accused as provided for in s 23 (1) of the Criminal Procedure & Evidence Act.

The court therefore ordered that the matter be removed from the roll since the indictment had lapsed. The charges stood dismissed. An order for the release of the accused from custody was made.

It noted that the conduct of the prosecution cannot escape comment. It shows a complete dereliction of duty. To allow an indictment in a serious case such as *in casu*, a double murder, to lapse is a sad occurrence. It is a serious indictment on the office of the National Prosecuting Authority. The National Prosecuting Authority should not approach the discharge of its mandate in a perfunctory manner. Society reposes confidence in an effective justice system. Society expects that a person who is accused of an offence is subjected to a fair hearing within a reasonable period and is either acquitted or convicted and if convicted, adequately punished. The conduct of the prosecution unfortunately did not only result in prejudice to the accused person as he has not been tried within the lifespan of the indictment but also to the administration of justice as well, since the court's time has been wasted including resources which as is common cause are not easy to come by in these difficult economic times.

It is hoped that the National prosecuting Authority pulls its socks so that incidences of dereliction of duty as manifest in this case are not repeated. This technical dismissal of the case does not really satisfy the accused either because it is not the end of the matter for him. State resources and the courts time will again be committed to this case since the prosecutor indicated that he will be preparing a fresh indictment. Courts are loathe to have criminal cases disposed of on technicalities as this defeats the ends of the criminal justice system.

The court directs the Registrar to ensure that a copy of this judgment is delivered on the Prosecutor General's Office so that appropriate remedial measures are taken to ensure that indictments are not left to lapse and for matters lodged in the High Court to be properly monitored so that they are not forgotten and in any event are disposed of with reasonable promptitude.

National Prosecuting Authority, state's legal practitioners
Coghlan, Welsh & Guest, accused's legal practitioners