DISTRIBUTABLE (56)

Judgment No. SC 61/06
Civil Application No. 271/06

BRYFORD NJOBVU v THE STATE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GARWE JA
HARARE, NOVEMBER 28, 2006 & JANUARY 25, 2007

D T Mwonzora, for the applicant

V Shava, for the respondent

ZIYAMBI JA: The matter comes to us from the regional court Harare purportedly in terms of s 24(2) of the Constitution of Zimbabwe which provides as follows:

> "(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 vexations."

It was alleged on behalf of the applicant that his right to a fair hearing within a reasonable time guaranteed by s 18(2) of the Constitution had been violated by the State and, on this basis, a permanent stay of proceedings against the applicant was sought.

The background to this application is as follows –

On 17 October 2005, the applicant appeared before the regional court sitting at Harare charged with one count of robbery. The allegations were that on 3 February 2001 in the company of two other men the applicant had robbed the complainant, at gunpoint, of a Mitsubishi Pajero motor vehicle. The applicant had been arrested on 9 February 2001 whilst driving the stolen vehicle.

The applicant, who was at this stage unrepresented, pleaded 'not guilty' and the complainant as well as his mother who was the owner of the vehicle gave evidence. The applicant declined to cross-examine them on the basis that both witnesses stated that they did not know him.

The hearing was adjourned to 24 April 2006. On that date, the applicant, now represented, appeared before the regional magistrate. The legal practitioner expressed her wish to make an application in terms of s 24 of the Constitution for a permanent stay of proceedings on the grounds that the applicant's right to a fair trial within a reasonable time had been infringed by the "duration of the proceedings from the time that they commenced … ." She said the applicant had been placed on remand on 26 February 2001 at Victoria Falls court. At this stage the legal practitioner was interrupted by the magistrate and the following dialogue ensued:

"Court:	Just a moment. This application is made here, but I thought s 24 is for you to make application to another court, not this one?
Legal Practitioner:	Indeed, your worship, I do intend to make the application but I want to bring it before the court and request that the honourable court refer it to

the Supreme Court. But I want to understand your Worship that I must bring before the court the reasons why, the basis of the application so that the honourable court can consider it and refer it to the Supreme Court.

Court: Well *prima facie* if there is such an application, the court's hands are tied and the court *a quo* has no right to prevent anybody going to the Supreme Court. So the application to this court in terms of s 24 will be brought to …, it is for no purpose for this court to hear it because there is no need to make an application to a court which has no powers to grant or refuse.

Legal Practitioner: Very well your worship, I am guided by the court. Indeed, your worship, I would also prefer that possibility because I was just trying to prevent the possibility where the court might find that the application is frivolous and vexatious and not refer it, but this is what I was trying to say. But I am indebted if the honourable court does not have that view.

Court: It is a right and not a decision for a court. It is to apply to the Supreme Court is a right and it is not for any court to make a decision on.

Legal Practitioner: I am indebted your worship."

The record ends with a bail application in respect of the applicant.

At the hearing before us Mr *Mwonzora* conceded that this application is not properly before us by reason of the failure of both the applicant's legal practitioner and the regional magistrate to comply with the law governing applications of this nature. However he placed most of the blame on the regional magistrate, who he submitted, prevented the legal practitioner from making the application and placing evidence before the magistrate in support thereof. He submitted that the matter

should be remitted back to the regional magistrate in order that the application may properly be made and considered.

Mr *Shava* who appeared for the State opposed an order for remittal on the grounds that the legal practitioner ought to have insisted on making the application and placing sufficient evidence before the court to establish her allegation that there had been a violation of the applicant's rights as enshrined in s 18(2) of the Constitution. Secondly, a remittal, he submitted would further delay the completion of the applicant's trial which had been interrupted by this application.

There is no doubt that the matter is not properly before us. In the first place, no notice was given to the prosecutor of the applicant's intention to make the application. The prosecution was not therefore afforded the time to which it is entitled, to investigate the cause of the delay.

See *S v Banga* 1995 (2) ZLR 297 at p 302 where GUBBAY CJ remarked:

> "It seems to me, also, that before permitting an accused 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." (my emphasis)

See also *Gadzanai Nkomo v The State* SC 52/06.

Secondly, the legal practitioner was obliged to call the applicant to give evidence. She ought to have stood her ground and directed the magistrate's

attention to the law governing the application she was making. She appeared not to be sure of the law in this regard. It is on the basis of the evidence led in the course of the application in the court *a quo* that this Court will conduct an inquiry into the constitutionality or otherwise of the delay.

See *S v Banga* (*supra*) at p 300.

In *Gadzanai Nkomo v The State* (*supra*), the following was said at p 5 of the cyclostyled judgment:-

> "Generally speaking, in applications of this nature, the length of the delay is the 'triggering mechanism'. If the delay is presumptively prejudicial then the court, going by the evidence on the record before it, will conduct an inquiry into the constitutionality of the delay, taking into account the factors which were set out in *In re Mlambo* 1991 (2) ZLR 339(SC). They are –
>
> 1. The explanation and responsibility for the delay;
> 2. The assertion of his rights by the accused person;
> 3. Prejudice arising from the delay; and
> 4. The conduct of the prosecutor and of the accused person in regard to the delay.

See also *S v Nhando & Ors* 2001(2) ZLR 84."

Thirdly, the magistrate was wrong in refusing to entertain the application. He is obliged to hear evidence and then refer the question to this Court for determination if he is of the opinion that the application is not frivolous or vexatious. He can only arrive at this conclusion if he has heard the evidence.

Further, in order to determine the merits of the application, the court would need to carry out an inquiry taking into account the factors outlined above. See *In re Mlambo* (*supra*). This it is unable to do because of lack of evidence. The absence of evidence is therefore fatal to the application. See *Gadzanai Nkomo v The State* (*supra*); and *S v Banga* (*supra*).

Accordingly, it is my view that the proceedings before the magistrate in respect of this application, having been conducted contrary to law and rules of procedure, were a nullity.

The application is therefore struck off the roll with no order as to costs.

GWAUNZA JA: I agree.

GARWE JA: I agree.

Jessie Majome & Company, applicant's legal practitioners