

REPORTABLE /ZLR (3)

Judgment No. SC 5/07
Civil Application No. 108/06

WALTER SIWAWA v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & MALABA JA
HARARE, FEBRUARY, 5 & MARCH 13 2007

S Machiridza, for the applicant

V Shava, for the respondent

CHEDA JA: The applicant was arrested on 28 November 2003. He was charged with theft of six computer hard drives, seven computer processors and eight computer memory chips from National Merchant Bank("NMB") where he was employed.

He appeared in court for remand several times until 10 October 2005. On that date further remand was refused. His trial could not start for various reasons.

On 16 April 2006 an application was made for referral of the matter to this Court on the ground that his rights to a fair trial within a reasonable time had been infringed upon. The court *a quo* granted that application.

In all, from the time of his arrest to the date this application was made, a period of only two years had passed.

The applicant gave evidence when the application was made. He was cross-examined. His evidence was that he was picked up by the police on 28 November 2003 and detained. On 30 November 2003 a warned and cautioned statement was recorded from him. He was taken to court on 1 December 2003. He was granted bail of \$500 000 with reporting conditions. After that he appeared in court for remand five times up to 14 May 2004.

On 14 May 2004 his legal practitioners wrote a letter to the prosecutor asking for a trial date. The trial date was set as 28 August 2004. The trial did not take place that day. He was further remanded to another trial date of 8 December 2004. On that date the trial magistrate was not available and the prosecutor was not ready to proceed. The matter was remanded to 9 March 2005. On that date the State was ready but the witnesses were not present. On 13 May 2005 the witnesses were again not present. On 6 October 2005 he asked his lawyer to apply for refusal of further remand. The application was granted. He was then summoned to appear in court and he made the application for referral of the matter to the Supreme Court.

In *In re Mlambo* 1991(2) ZLR 339 (SC) the Supreme Court set out a number of factors that need to be taken into account before an application for referral to the Supreme Court for a permanent stay of prosecution is made.

On the point of raising the issue with the lower court, the applicant clearly did complain and asked for a trial date but the trial never took place. The reason for that have been given.

The Supreme Court also pointed out that the length of the delay is one of the factors that triggers the inquiry into the delay that may prejudice an

accused person. In this case the delay of two years cannot be said to be too long.

Further to that, there were clear reasons why the trial could not take place even when the State was ready to prosecute. On one occasion the trial magistrate was not available. On more than two other occasions the witnesses were not present. This is from the applicant's own evidence. It is very likely that the trial could have started long before the application for referral of the matter was made, in which case the trial could have taken place within a period of less than two years. It cannot be said that the State was to blame for all the occasions when the trial could not take off.

In his evidence the applicant did not show that the delay prejudiced him in any way. He is on bail and continues to be employed by the complainant. All that he complained of is that the witnesses might forget what took place by the time they are called to give evidence.

The case against the applicant is not a complicated one needing a lot of details that witnesses are likely to forget. It has not been shown or alleged that there are witnesses who have either died or disappeared who could have given any crucial evidence at his trial. He has neither shown nor alleged that there is anything related to the delay that makes it difficult for him to prepare his defence.

Section 18(2) of the Constitution of Zimbabwe was intended to provide relief for persons who find that they are not being afforded a fair hearing within a reasonable time. It has not been shown in this case that the delay of two years, and for which reasons have been given, is unreasonable.

I therefore see no merit in the application and it is dismissed.

No submissions were made on costs, so there will be no order as to costs.

SANDURA JA: I agree.

MALABA JA: I agree.

Muzangaza, Mandaza & Tomana, applicant's legal practitioners