JUDAH CHIKOVE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 17 November 2021 & 22 February 2022

T Gurira, for the applicant
A.Masamba , for the respondent

MUTEVEDZI J:

1. INTRODUCTION

One of the lessons I drew from my stint in the bail court is that bail applications are generally remarkable for being unremarkable. More often than not they are dry. This one was no exception until something intriguing surfaced. The applicant seeks to be admitted to bail pending trial on changed circumstances in terms of s 116(c)(ii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter "the Act"). He alleges that facts which were not placed before the judge who previously determined his initial application have arisen.

2. BACKGROUND

The history of this case is checkered. The applicant was arrested on 21 March 2018 and charged with the crime of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was indicted for trial in the High court on 27 January 2020. His trial commenced without incident, before Honourable Justice Ndewere. In between his initial appearance in court and the commencement of trial, the applicant had unsuccessfully applied for admission to bail. The trial progressed to the point when the defence closed its case. Sometime in May 2020, the court directed both the state and the defence to file closing submissions. Judgment was then reserved. For some inexplicable reasons the handing down of that judgment never saw the light of day until the trial judge unceremoniously left judicial office in June 2021. Her departure was in circumstances which preclude her from legally returning to complete the partly heard trial. As will be illustrated later, by operation of law, the trial stands aborted and must commence afresh.

Having waited for the judgment, no doubt with bated breath for close to a year, the applicant finally buckled. He made a daring dash for freedom through the bail process. Unfortunately, his hope dissipated when the court which dealt with his application took a dim view of his argument. It ordered the removal of his application from the roll and advised him to wait for his judgment which it believed was imminent. To compound his misfortunes the judgment never came because a few months later the trial judge left office. When the applicant discovered that, he launched another bid to reinstate his application to be admitted to bail on changed circumstances. The efforts finally paid off. On 15 November 2021, his application was placed before me for determination. The state strenuously opposed that application. I considered the arguments for and against the grant of bail. It was from those representations that questions arose regarding the application's conformity with bail law. As a result, I queried from both counsel whether it was competent for a person in the applicant's circumstances to apply for bail given the circumscription of the Court's power to admit persons to bail in s 116 of the Act. I further directed them to explain the basis upon which the applicant was being held in custody in view of the provisions of s 160(2) of the same enactment. Both filed submissions.

The applicant's counsel adopted a two-pronged argument. She insisted that the applicant's case ought to have been dismissed for want of prosecution in terms of s 160(2) failing which he ought to be admitted to bail as he has clearly demonstrated a change in his circumstances that entitle him to the relief he seeks. Mr *Masamha* appearing for the Prosecutor-General was adamant that s 160(2) had no relevance in this case because the applicant's trial commenced in this court within the stipulated six months from the date of committal. The circumstances which led to the discontinuation of the trial shortly before its completion could not in any way be blamed on the prosecution. He further argued that the applicant had also not demonstrated any changed circumstances in his case. As such his application was doomed to fail.

3. THE ISSUES

Some of the questions which arise from these facts appear to me to be novel. They are:

a) Whether or not an applicant whose trial is aborted midstream through removal of the trial judicial officer from office is entitled to apply for bail?

b) If he can apply for bail, whether or not the discontinuation of the trial is a changed circumstance as envisaged under s 116(c)(ii) of the Act which warrants his release on bail?

c) A corollary to issue (a) above is whether or not the applicant was brought to trial within the statutory six months from the date of his committal regard being had to the abortive proceedings?

4. **THE LAW**

4.1. Power to admit to bail

The power of the High Court to admit persons to bail is regulated by the Act in s 116 thereof. It provides that:

> **"116 Power to admit to bail**
> Subject to this section and sections 32 and 34, a person may, upon an application made in terms of section 117A, be admitted to bail or have his or her conditions of bail altered—
> (a) in respect of any offence, by a judge at any time after he or she has appeared in court on a charge and before sentence is imposed." (the underlining is mine)

I conceive the provision to mean that the court's power to grant bail is dissimilar to that which it may generally exercise in instances where it orders the release of a person held in detention for reasons other than appearing in court on a charge. Put differently, a person held in detention without facing criminal charges has no right to apply for bail. In *Ukor Martin Okey* v *Chief Immigration Officer & 2 Ors* HH 400-14 at p. 10, MUREMBA J dealt with a case in which a person had been deprived of his liberty without a criminal charge having been preferred against him. The issue before the court was not related to bail. The remedy sought by the detained person was one which is generally referred to as an interdict *de homine libero exhibendo.* The judge expressed the following sentiment:

> "…. It is clear from a reading of this section that there can be instances where a person's liberty is deprived without trial…in instances where there is deprivation of personal liberty without a criminal charge having been preferred, the deprivation thereof should be authorised by law or be in compliance with the law…"

From that standpoint, it can be argued that the bail process does not exist in a vacuum. It is a remedy under criminal procedure exclusively available to persons held in custody on a criminal charge. Applications for bail in their various species can only be made where the person facing a criminal charge has appeared in court. In all other circumstances, the release of detained persons cannot possibly be ascribed to bail. Other remedies have to be invoked.

That proposition was accepted by CHITAKUNYE J (as he then was) in the case of *Mukoko* v *The State* 2009 (1) ZLR 93 (H) at p.97. The judge was emphatic that the meaning of the phrase 'after a person has appeared in court on a charge used in s 116 of the Code' must be construed to mean after the initial process of a criminal trial which is the initial appearance in court before a judicial officer and the legal justification for his or her arrest and detention is presented to the judicial officer. He added that any argument that because one has simply passed through a courtroom, one has therefore appeared in court on a charge, is outrageous.

What is clear from CHITAKUNYE J's *dictum* is that as long as the legal processes and justifications have not been complied with, the issue of bail does not and cannot arise. Whilst the court therein was dealing with the period before an accused's initial appearance in court I wish to add that the processes and legal justifications at any other later stage of an accused's appearance in court may equally vitiate his or her right to apply for bail.

Ordinarily when an accused is arrested and charged with a crime, he is placed on remand in the magistrates' court. It is on the basis of that remand that he or she is described as appearing in court on a charge. If for instance, further remand is refused at some stage when the accused is in custody, he should simply walk out of prison. See the case of *Mhari* v *Mangoti NO & Ors* 2015 (1) ZLR 420 (H) at 425. If anyone restrains the accused from leaving detention he (the accused) cannot seek his release from custody through a bail application. Where the offence is triable in the High Court or where the Prosecutor-General decides to have the matter tried in the High Court, the person is indicted to the High Court for trial. That person can only be regarded as properly appearing before the High Court on a charge when he has been duly committed for trial. Against that background, my comprehension of the law is that an application for bail is solely permissible where an accused is either still on remand in the Magistrates' Court or has been properly committed for trial in the High Court.

4.2. The consequences of a lapsed indictment on right to apply for bail

It is also important to note that an accused person's indictment for trial in the High Court automatically terminates his or her appearance on remand in the Magistrates' Court. It is not possible for an accused to continue being on remand after his or her indictment in terms of s 65 of the Act. Once committed, the person is dealt with under the provisions of s 160 of the same enactment. The pertinent part is subs (2) thereof which provides that:

"(1) ….

> (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."

What sticks out from the provision is that an indictment lapses if the accused is not brought to trial within six months of the date of his committal. The cases of *S* v *Bonyongwe* HH 193-17 at p 3 and *Mukuze & Anor* v *The State* HH 17-05 both lend credence to that observation if any is required. Essentially, the *ratio decidendi* of both those cases is that a court is obligated to dismiss a case for want of prosecution in instances where the accused is not brought to trial after the lapse of six months from the date of indictment. Needless to state, that requirement is predicated on the need to protect an accused person's right to a fair trial within a reasonable time before an independent and impartial tribunal as envisaged by s 69(1) of the Constitution of Zimbabwe, 2013. Once the indictment has lapsed, the accused will no longer be appearing in court. He therefore loses the right to be admitted to bail. In fact the court is stripped of its power to admit such an accused to bail. Where there is a violation of the accused's right to freedom remedies other than admission to bail ought to be pursued.

Had these issues been the only legal considerations, the resolution of the issues at hand would have been an open and shut case. Unfortunately, they are not. The case is an aberration.

4.3. The removal of the trial judge from office

As indicated in the opening paragraphs of this judgment, on one hand, counsel for the applicant implored the court to either declare the applicant's case dismissed for want of prosecution in terms of s 160(2) of the Act or grant him bail on the basis that his circumstances have drastically changed. On the other hand counsel for the prosecution was adamant that s 160(2) of the Act which prescribes a dismissal of an accused's case where he or she is not brought to trial within six months from the date of committal has no bearing on this application because the applicant was committed for trial within the statutory six months. In his argument, the circumstances which disrupted trial were beyond the control of the Prosecutor-General.

That fact advanced by the Prosecutor is largely common cause. That both the Prosecutor-General and the applicant were not responsible for the discontinuation of the trial is hardly debatable. The point of departure is the consequence of the removal of the trial judge from judicial office which rendered the trial of the applicant abortive.

The case of *S* v *Tsangaizi* 1997 (2) ZLR 247 at p. 248-249 perhaps represents the most authoritative statement of the law on that issue in our jurisdiction. In that case, this court cited with approval the proposition by Reid-Rowland in his book, *Criminal Procedure in Zimbabwe* LRF 1997 p 28-6 that:

> "… if the judicial officer retires or resigns, the proceedings are abortive (except to the extent that a judge of the High Court or Supreme Court may complete proceedings begun by him)and lapse, without them having to be set aside."

I fully embrace that *dicta* for it is clearly founded on undeniable and logical deductions from an elementary principle of the law. Decisions of every court are based on that court's jurisdiction. Where a judicial officer has no jurisdiction to try a matter, he or she cannot take one step forward in determining the issues at hand. Where he or she loses jurisdiction after proceedings have commenced the proceedings undertaken to that stage are necessarily a nullity. See also *S v Sibanda* 2005 (2) ZLR (H) 117 at 120 where GARWE JP citing with approval the case of *R* v *Mhlanga* 1959 (2) SA 220 (T) at p. 250 also agreed with this reasoning.

I would take the issue even further and say that in addition to the examples of resignation and retirement adverted to in the *Tsangaizi case* supra, the death knell may sound even louder for the jurisdiction of a judicial officer who has been dismissed from office. Whereas in cases of resignation or retirement the judicial officer may be able to complete the cases which he or she will have partly heard, it is impossible for a dismissed judicial officer to do so. The question of whether that judicial officer's unfinished proceedings can stand has a foregone conclusion. He or she will have ceased to be a judicial officer. The above point was succinctly captured by the Supreme Court in *Monderwa Farm (Pvt) Ltd* v *B J B Kirsten (Pvt) Ltd* 1993 (2) ZLR 82 (S) at p. 87 as follows:

> "But, in the case of a judge removed from office pursuant to s 87(1) of the Constitution, for inability to discharge the function of his office due to infirmity of body or mind or any other cause, or for misbehaviour, the power to complete outstanding matters subsequent to the date of removal (or suspension by the President pending a decision whether or not to remove for misbehaviour) is not to be implied. If the judge concerned is found to be unfit to discharge the functions of his office then he is obviously unfit to complete matters previously commenced by him."

In casu, the trial judge was removed from office. Once that happened she ceased to have jurisdiction over the case. Her incomplete proceedings became a nullity. They were legally void. Every action based on those void proceedings, including the applicant's indictment, fell away. See *Macfoy* v *United Africa Company Limited* [1961] 3 All ER 1169.

By parity of reasoning, if the proceedings were a nullity it also means that the applicant's trial never commenced before the High Court. That scenario entails a reversion to the *status quo ante* before the accused was indicted. In other words, the nullification of the trial meant that the accused had no case before the High Court. He returned to be on remand in the magistrates court in the same way as though he had never been indicted.

4.4. Applicant's entitlement to dismissal of his case for want of prosecution

From the above, the question which arises is whether the applicant was entitled to seek the dismissal of his case on the basis that his trial failed to commence within the stipulated six months from the date of committal and as a consequence walk free so to speak? In my view, s 160 (2) of the Act is not intended to cover instances such as the applicant's. The law could not have envisaged a scenario where a person accused of a serious offence like murder would walk away from justice aided by such a blatant stratagem particularly in situations where the prosecution appears to have done everything to have the person tried.

The provision applies to situations where after being indicted for trial at the High Court, an accused's trial fails to commence within six months of that committal date. As this court correctly stated in *S* v *Mukuze & Anor* 2005 (1) ZLR 79 (H) at p 86, the failure to commence trial must not be attributable to the non-availability of the accused. The dismissal contemplated in subs (2) is, therefore, subject to the proviso thereof that the running of the six months period is interrupted where trial fails to commence for reasons beyond the control of the Prosecutor-General. See also *Mukuze & Anor* v *Attorney General* 2005 (1) ZLR 6 (H) where UCHENA J (as he then was) said the proviso to s 160(2) spells out the circumstances which interrupt the lapse of the six months period. It would therefore be preposterous for the applicant to seek a dismissal of his case on the basis of void proceedings. The consensus between both counsels for the applicant and respondent that the proceedings will have to commence afresh strengthens that realisation.

The above findings support counsel for the prosecution's view in this case that s 160(2) cannot apply in circumstances where trial had started within the prescribed period but was then disrupted for reasons which cannot be attributed to the Prosecutor-General. In this case, trial commenced within the stipulated six months. The Prosecutor-General was not culpable for the removal of the trial judge from office or the resultant abortion of proceedings. The entitlement to a dismissal of his case in terms of s 160(2) cannot therefore, be available to the applicant.

In the final analysis, it is the court's finding that the applicant reverted to his status as an accused on remand in the magistrates court after he was duly committed for trial in the High Court but had his trial aborted midstream by reason of removal of the trial judge from office. He can neither seek the dismissal of his case in terms of s 160(2) of the Code nor demand a verdict as the trial judge lost jurisdiction to render same.

5. THE APPLICANT'S REMEDY

Having concluded that the applicant is still on remand in the magistrates court it occurs to me that when he was indicted for trial, he was in custody after his initial application for bail had been dismissed. A return to the *status quo* means that he is placed squarely in that position. Had he been indicted from out of custody, I harbour no doubt that he would have been entitled to his immediate freedom. In the circumstances his remedy lies in the application for bail on changed circumstances which he placed before this court. I therefore find that his application is properly before me. I now turn to deal with it on the merits.

> **"5.1. Bail on changed circumstances**
>
> The law on bail pending trial on changed circumstances in this jurisdiction is settled. It is spelt out in s 116 (c) (ii) of the Code. The section provides that:
>
> **116 Power to admit to bail**
>
> … a person may, … be admitted to bail ...
>
> (a)…
>
> (b)…
>
> (c) if he or she is a person whose case is adjourned in terms of section 55(1) of the Magistrates Court Act [*Chapter 7:10*] or in respect of whom an order has been made in terms of section 351(4), by a judge or by any magistrate within whose area of jurisdiction he or she is in custody:
> Provided that—
>
> (i)…
> (ii) where an application in terms of section 117A is determined by a judge or magistrate, a further application in terms of section 117A may only be made, whether to the judge or magistrate who has determined the previous application or to any other judge or magistrate, if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination**."** (emphasis is mine)

Clearly, the law provides an applicant for bail on changed circumstances with a very narrow basis on which to approach a court and seek to persuade it to change its earlier decision

to refuse him bail. I consider the basis to be restricted because of the construction of the enabling provision. In my view, it confines an applicant to raising issues of fact only. Even then, the applicant cannot raise any fact he so wishes. He is confined to only those facts which were not placed before the court which determined the previous application. It is not without significance that the legislature uses the conjunctive and to connect the first part of subs (c)(ii) to the phrase "which have arisen or been discovered after that determination". An applicant who wishes to be successful must satisfy both parts.

To its credit, this court has in a long line of cases extensively dealt with the subject. These range from *Range* v *S* HH 127-04, *Moyo* v *S* HH 95-08, *Nhachi* v *S* HH 7-10, *Kereke* v *Maramwidze* HH 792-16 to *Chikumba* v S 2015 (2) ZLR . What however easily catches the eye in a reading of those precedents is that only the cases of *Range and Chikumba* supra made an attempt to interpret s 116(c)(ii) and to ascribe the correct meaning of the words used in the provision.

To begin with, the phrase 'changed circumstances' does not appear in the statute yet in virtually all the cases cited above it is so widely referred to that it overshadows the actual terminology used by the legislature. It is a phrase that resulted from judicial interpretation of the section. My view is that the use of that nomenclature somehow liberalised the courts' interpretation of the section beyond what it entails. The use by the legislature of the conjunctive "and" means both requirements in the two segments of s 116(c)(ii) must be fulfilled. First, the applicant must illustrate to the court that the facts were not made available to the judge or magistrate who determined and refused the previous application. Second, he must demonstrate that the facts arose or were discovered after the previous determination was made.

If the facts had always been there, the applicant is prohibited from relying on them. The deliberate reference in the statute to facts is equally significant. By the application of the *expressio unius* rule of statutory interpretation the express mention of the word 'facts' necessarily implies the exclusion of issues relating to the law from consideration as changed circumstances. For that reason, I am convinced that issues of law cannot be used to motivate an application for bail on changed circumstances. It is unacceptable for an applicant to claim that a legal issue arose or was discovered after the previous determination was made because the law is always there. Even a new interpretation of the law cannot qualify as a new fact which would have arisen or been discovered. That the applicant was not aware of the law or that his

counsel had not discovered it can equally not be an excuse. The applicant's indiscretions or ignorance in relation to the law must not be considerations by a court in determining an application for bail on changed circumstances.

In addition, it is my firm view that an applicant approaching the court on changed circumstances bears the obligation to advise the court of the full facts which he placed before the court that previously denied him bail. In equal measure he must disclose the grounds on which the court previously refused his application. It is only when an applicant takes the court into his or her confidence on all those issues, that the court hearing the new application is able to juxtapose the initial application with the current one. From the two it can appropriately assess the presence or otherwise of changed circumstances.

In the instant case, the applicant argues that the unfortunate discontinuation of his trial and the mooted fresh commencement of proceedings is a new fact which must motivate the court to admit him to bail. In its response to the application, I did not hear the State to argue that what the applicant alleges does not amount to changed circumstances. Instead, prosecution's opposition was based on the argument that they are taking the necessary steps to ensure that the applicant stands his retrial as soon as possible. Further, they argued that if admitted to bail, the applicant is likely to abscond as he is now aware of the overwhelming evidence against him.

As already indicated, the applicant's trial was aborted at judgment stage. There can be little doubt if any that a development with such far-reaching repercussions in the trial of an accused person may fail to be recognised as a changed circumstance for purposes of an application of this nature. Surely it is a fact which was not previously made available to the court. It arose well after the determination and refusal of the applicant's initial application for bail. Recognising the momentous significance of a trial *de novo* GARWE JP (as he then was) in the case of *S* v *Sibanda supra* at 125A had the following to say:

> *"*That the accused now has to undergo a new trial is extremely prejudicial and certainly not in the best interests of justice. It is unknown whether the witnesses are still available and if they are to what extent their recollection of the events may have been affected by the passage of time."

That finding by this court flies right in the face of the argument by counsel for the State that the applicant now knows that there is overwhelming evidence against him. On the contrary, the reality is that it cannot be said with certainty that the same evidence adduced at the stillborn

trial will also be adduced at the fresh trial. Even if that were to happen, the prejudice occasioned to the applicant cannot be understated. He has been in custody since the time of his arrest in 2018. That is a period of about four years of pre-trial incarceration. It is not in the best interests of justice that he continues to be held in custody.

What, however, detracts from a favourable resolution of the applicant's case is that he did not disclose the reasons why the court previously refused his application for bail. This court would have been better placed to determine the instant application had it been afforded an opportunity to compare the new application with the old one. Had the new facts in this application been ordinary I would not have hesitated to refuse to grant the relief sought. The circumstances are, fortunately for applicant, very preeminent. An overall analysis of the issues at hand leaves the court convinced that there is no way the new facts raised in this application would have been available to the court that denied the applicant bail in the first instance. I therefore, harbour no apprehension that the applicant's non-disclosures in that regard could be an attempt to hoodwink this court into dealing with an issue previously determined by the court which refused him bail.

6. DISPOSITION

It is this court's finding that once his trial was aborted the applicant reverted to his status as an accused on remand in the magistrates' court. His remedy lay in motivating the court to admit him to bail on the basis of changed circumstances. He has demonstrated the existence of such changed circumstances. In the premises it is ordered that:

The applicant's application for admission to bail on changed circumstances succeeds. He is admitted to bail on the following conditions:

1. That before he fulfils the conditions stated below the National Prosecuting Authority shall facilitate and the applicant shall make himself available for his reinstatement on remand in the magistrates' court on the Criminal Record Book number allocated to him before his abortive indictment for trial in the High Court.
2. The applicant deposits **ZWL $20 000.00** (Twenty Thousand) with the Clerk of Court at Chegutu Magistrates' Court.
3. Resides at Plot No. 11 Laron Farm, Chegutu until this case is finalised

4. Reports at Pfumojena Police Station twice a week on Mondays and Fridays between the hours of 6am and 6pm until this case is finalised
5. Is directed not to interfere with witnesses and or investigations in this case

Sinyoro & Partners, applicant's legal partners
National Prosecuting Authority, respondent's legal partners