HB 321-17
HCB 167-17
XREF CRB 1454 A-B-17
XREF HCB 122-17

WEBSTER NYARUVIRO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 20 OCTOBER 2017 AND 26 OCTOBER 2017

Bail Application

T Vhiki for the applicant
Ms N Ngwenya for the respondent

MATHONSI J: This is an application for bail pending trial based on changed circumstances, the applicant having been denied bail by this court, per TAKUVA J, by judgment delivered on 31 August 2017 on the grounds that he was not a good candidate for bail.

Barely two months later the applicant filed this application on the basis of changed circumstances which entitle him to a re-consideration of his bail application. The changed circumstances are two fold, namely that three months have lapsed since his arrest on 12 July 2017 and yet the trial has not commenced leaving him languishing in pre-trial incarceration and secondly that he has since made an application for a referral of his matter to the Constitutional court to determine the constitutionality of the section under which he is charged. Considering that the constitutional issue is yet to be resolved and is likely to take time, he should be admitted to bail.

The application is opposed by the state which has pointed out that it is in fact the applicant who has caused the delay in the commencement of his trial because the trial had been penciled to commence on 10 August 2017. It could not take off because the applicant is the one who then made an application for a referral to the Constitutional court thereby necessitating a delay. The state has also pointed out that the second purported change of circumstances is fallacious in light of the fact that the magistrates' court dismissed the application for referral on the ground, *inter alia* that it was frivolous or vexatious.

It is true that an inordinate delay in bringing an accused person to trial may, in appropriate circumstances, be regarded as a change of circumstances as to entitle the court to reconsider an application for bail pending trial. This derives from the fact that an accused person has a constitutionally protected right, once arrested, to be brought to trial within a reasonable time. Also, regard must always be had to the fact that criminal prosecutions in this jurisdiction are prosecution driven, the Prosecutor General being always *dominus litis* in such matters. See *S* v *Sabawu and another* 1999 (3) ZLR 314 (H). Therefore where there are unreasonable delays in bringing accused persons to trial, the Prosecutor General does not share the blame with anyone, it is his cross to carry. He cannot have his cake and eat it at the same time. Where he persists with the charges preferred against an accused person, then by all means he should get on with it. He cannot sit on the charges while at the same time keeping the accused person in custody.

But that is the furthest one can go. The accused person must not have a hand in causing the delay in the commencement of the trial if he is to benefit from the aspect of changed circumstances owing to an ordinate delay in the prosecution. Where the delay has been occasioned by the fault of the accused person himself he cannot benefit from his own fault. In that regard one can borrow from the hallowed principle of the common law expressed in the aphorism '*nemo ex proprio dolo consequitur actionem'* which, loosely translates to no one maintains an action arising out of his or her own wrong.

The applicant is jointly charged with Max Bloomton of contravening s82 (1) of S. I 362/90 as read with s128 (b) of the Parks and Wildlife Act [Chapter 20:14] as amended by s11 of the General Laws Amendment Act, No 5 of 2011. The two were found in possession of raw ivory somewhere in Hillside Bulawayo. They were denied bail by judgment of this court namely *S* v *Nyaruviro and Another* HB 262-17. The *ratio decidendi* of that decision is found right at the end at p6 of the cyclostyled judgment where the learned judge pronounced;

> "For these reasons I take the considered view that the self-evident seriousness of the offence and the apparent strength of the case against both applicants may well induce them to abscond. I also find that both applicants have failed to lead evidence which is satisfactory to show that exceptional circumstances exist, which, in the interests of justice permit their release."

In my view that state of affairs still exists. In fact the only changed circumstance since that judgment was delivered is that the applicant is now approaching this court alone and without his co-accused. The risk of abscondment remains firmly in place and so is the applicant's signal failure to point to any exceptional circumstances commending him for release when he faces a Third Schedule offence.

For what it is worth, what he has identified as changed circumstances, the three months delay since his arrest, is attributable to his own conduct of pursuing what has been found to be a frivolous application for referral to the Constitutional Court. The application itself has been dismissed. The application is simply without legal foundation.

In the result, the application is hereby dismissed.

Liberty Mcijo and Associates, applicant's legal practitioners
National prosecuting Authority, respondent's legal practitioners