IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 107/05
Reportable

In the matter between

FRANK PETER ZANNER **Appellant**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS, JOHANNESBURG **Respondent**

CORAM: **SCOTT, NUGENT, VAN HEERDEN JJA, MAYA et CACHALIA AJJA**

HEARD: **16 FEBRUARY 2006**
DELIVERED: **3 APRIL 2006**

Summary: Right to a fair trial - s 35(3)(d) of the Constitution - whether a lengthy delay in commencing criminal prosecution of a murder charge caused the accused trial-related prejudice warranting a permanent stay of the prosecution.

Neutral citation: This judgment may be referred to as *Zanner v Director of Public Prosecutions* [2006] SCA 56 (RSA)

JUDGMENT

MAYA AJA:

MAYA AJA:

[1] This is an appeal against a judgment of the Johannesburg High Court (Van der Byl AJ) dismissing the appellant's application for a permanent stay of prosecution of a charge of murder against him. The appeal comes before us with the leave of the court *a quo*.

[2] The facts giving rise to the appeal are these. On 12 March 1992 the appellant inflicted a fatal head wound on Mr Samuel Tumisang Segaetso ('the deceased') with a measuring instrument known as a vernier. The incident occurred in a workshop at SA Linishers, a factory owned by the appellant's father in Krugersdorp. Both the appellant and the deceased, a fellow employee, were on duty at the time. The events leading up to the infliction of the deceased's injury and whether or not it was accidental are in dispute. It appears, however, that the incident followed a verbal exchange between the appellant and another fellow employee, Mr Anthony Picota.

[3] According to one of the factory workers present at the material time, Ms Martha Tshigalo, from whom the police subsequently took statements, the appellant had taken the vernier from a tool cupboard and had thrown it in

Picota's direction as the latter walked away from him. In his statement to the police, the appellant alleged that the vernier slipped from his oily hand when he flung both hands, which were at shoulder level, down to his sides 'in a gesture of irritation' because Picota walked away from him before he had finished talking to him. Whatever the case may be, the vernier travelled a distance of approximately seven metres, struck the deceased on the left temple and lodged itself deep in his skull. The appellant caught him as he fell. According to witnesses, the appellant removed the vernier from the deceased's head and hosed him down with water. The deceased was then taken to hospital where he subsequently died.

[4] The police duly investigated the matter and took statements from the appellant and witnesses, including Tshigalo and Picota. Photographs of the scene were taken and the appellant pointed out to the police his, the deceased's and Tshigalo's positions at the time of the incident, which were then recorded. At the conclusion of the police investigations, the case docket was submitted to the Attorney-General for his decision.

[5] An inquest in terms of the Inquests Act 58 of 1959 was scheduled for 23 November 1992. The proceedings were, however, not conducted as the

witnesses failed to attend. On 4 February 1993 the Attorney-General was notified that it had been established that Tshigalo, the key witness, could not be traced. An ‘informal’ inquest was consequently held on 8 March 1993, at which oral evidence was not led and the presiding magistrate considered only the statements contained in the docket. The magistrate recorded that the cause of death was ‘a penetrating brain injury sustained when a sharp object was thrown at the deceased’, but stated that he was ‘unable to make a finding’ as to ‘whether death was brought about by any act or omission involving or amounting to an offence on the part of any person’ as is required by s 16(2) of the Inquests Act.

[6] The Attorney-General instructed the police to trace Tshigalo and when she was found, in April 1993, ordered that the appellant be prosecuted on a charge of culpable homicide. On 1 July 1993, the Attorney-General was notified that the appellant had been summoned to appear in the relevant magistrate’s court on 5 August 1994. The case was subsequently postponed to 26 January 1994 for trial. However, on that date, the trial did not commence as the charge against the appellant was withdrawn pursuant to representations made on his behalf to the Attorney-General. The nature of those representations is not known as there is no record thereof.

[7] In April 2004, more than ten years after the charge was withdrawn, the appellant was indicted in the Johannesburg High Court on two counts of murder. One charge related to the alleged murder of his wife, Mrs Sibille Zanner, with a crossbow arrow on 25 September 2002. The other charge is the subject matter of this appeal and relates to the death of the deceased. It would appear that in the course of police investigations into the death of the appellant's wife, the investigating officer learned of the earlier incident involving the death of the deceased and re-opened the case. The case was re-investigated and further statements were taken from the original investigating officer, Inspector Booysen, Tshigalo and other witnesses who had not previously been interviewed by the police. According to Booysen, he had made an investigating officer's affidavit at the time of the incident in 1992 and had referred it, together with the case docket, to the senior public prosecutor. It would seem that this affidavit by Booysen was thereafter lost. A docket containing the later statements and the record of the inquest proceedings, comprising all the original witness statements, was submitted to the respondent who then decided to prosecute the appellant on a charge of murder of the deceased.

[8] Relying on s 35(3)(d) of the Constitution, the appellant challenged the validity of the latter charge and applied for a permanent stay of the criminal prosecution. It was contended on his behalf that he would suffer trial-related prejudice if the prosecution were allowed after about ten years had elapsed from the date the appellant was first charged with the offence as: (i) the original case docket and the investigation diary had disappeared; (ii) statements had been obtained from a minority of witnesses whose version suited the state case and other possible eyewitnesses could no longer be traced, and (iii) the quality of the available evidence would be materially flawed as a result of the effect of the lapse of time on the memories of the witnesses and the appellant. The court *a quo* found these grounds to be speculative and dismissed the application on the basis that the appellant had failed to establish prejudice. These remain the issues on appeal. In addition, it was contended before this court that the combination of factors in this case constituted extraordinary circumstances justifying a permanent stay of prosecution.

[9] Section 38 of the Constitution grants a relevant party a right to approach a competent court on the ground that a right in the Bill of Rights has been infringed or threatened and, depending on the circumstances of

each particular case, the court may grant appropriate relief, including a declaration of rights. (See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 18-19.) One of the broad range of remedies which the court may grant where the right to a fair trial is under threat is a permanent stay of the criminal prosecution.

[10] This is, however, a drastic remedy which is granted sparingly and only for very compelling reasons. Describing the remedy in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 38, where the court was dealing with an accused's right to a speedy trial under s 25(3)(a) of the interim Constitution, the precursor to s 35(3)(d) of the Constitution (which, although worded differently, has the same object), Kriegler J said:

'[T]he relief…is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused. An accused's entitlement to relief such as this is determined by s 7(4)(a) of the interim Constitution [the similarly worded precursor to s 38 of the Constitution]'.

The learned judge continued at para 39:

‘A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.’

The remedy may be granted in the absence of trial-related prejudice, where ‘there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate’. (See *Wild and another v Hoffert NO and others* 1998 (3) SA 695 (CC) para 27; see also *McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 542 (SCA).)

[11] Section 35(3)(d) entrenches an accused’s right to a speedy trial and provides:

‘Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay’.

The object of this provision is to protect an accused’s liberty, personal security and trial-related interests (see *Sanderson* para 20; *Wild* para 5).

[12] The protection of these three rights is described in a judgment of the Supreme Court of Canada, *R v Morin* (1992) 8 CRR (2d) 193 at 202, quoted with approval in *Sanderson* para 20, as follows:

'The right to security of the person is protected …by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.'

(See also *Barker v Wingo, Warden* 407 US 514 (1972) at 532.)

Trial-related prejudice refers to prejudice suffered by an accused mainly because of witnesses becoming unavailable and memories fading as a result of the delay, in consequence whereof such accused may be prejudiced in the conduct of his or her trial. (See *S v Dzukuda and others; S v Tshilo* 2000 (2) SACR 443 (CC) para 51.)

[13] Counsel were agreed that the delay in the prosecution of the case had to be calculated as from August 1993, when the appellant was first charged (ie served with an indictment or summons) with the offence. This may well not be correct and it could be argued that it would be inappropriate to set a time-bar in circumstances where, for example, the prosecuting authority decides not to prosecute because it is unable or does not believe, for any number of valid reasons, that a case can be prosecuted successfully against an accused, as may have been the case in the present matter. As the court pointed out in *Sanderson* para 30, 'the test for establishing whether the time

allowed to lapse was reasonable should not be unduly stratified or preordained...[t]he court will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us'. Be that as it may, the issue was not debated before us and it is not necessary in my view to consider it in the light of counsel's agreement. I shall, therefore, assume in favour of the appellant, but without deciding, that for the purpose of evaluating the lapse of time in conjunction with other relevant factors, the delay in question commenced on the date accepted by counsel.

[14] That there was a lengthy lapse of time between August 1993 (when the first decision to indict the appellant was given effect to) and April 2004 (when he was indicted for the second time) is beyond doubt. The time period is, of course, central to the enquiry whether there has been an unreasonable delay. Nevertheless, the fact of a long delay cannot *per se* be regarded as an infringement of the right to a fair trial. Whether there was 'unreasonable delay' must be determined in the context of the particular circumstances of each case, taking into account factors such as the length of the delay, the reason for the delay, whether the accused has suffered or is likely to suffer prejudice by reason thereof and the accused's assertion of his right to a

speedy trial. The last-mentioned right is not restricted to those who seek to enforce it (see *Sanderson* paras 25-26, 32).

[15] The question of prejudice is, in my view, decisive on the facts of this case. Before I deal with it, however, it is necessary to highlight that, but for the representations made on behalf of the appellant to the Attorney-General, which are peculiarly within the appellant's knowledge and details of which he chose not to disclose, the trial would have commenced on 26 January 1994. It is clear that the appellant had no interest at all in having a trial and it hardly lies in his mouth in the circumstances to blame the police for 'failing to properly investigate the matter in the first instance' and to argue, as his counsel sought to do, that the respondent is 'hiding behind a wrong and/or ill-considered [or negligent] decision to withdraw the charge' - a decision which, on his own version, was based solely on his entreaties. This court is, in any event, not entitled to interfere with the exercise of the respondent's discretion by enquiring into the correctness of his or her decision not to prosecute. Furthermore, as the appellant's counsel was constrained to concede, the withdrawal of the charge did not carry with it a guarantee that, on reconsideration at some later date, the appellant would not be recharged. That was a risk the appellant was apparently willing to take in preference to

the trial proceeding on the set date. In evaluating the delay this is, in my view, a relevant consideration.

[16] I turn now to consider the question whether the delay has caused the appellant prejudice. It should be borne in mind that the enquiry does not concern the appellant's liberty or personal security. After the charge was withdrawn against him in January 1994 nothing happened in connection with the case until April 2004. Issues of restricted freedom, stress, anxiety or social ostracism do not therefore arise. The focus is solely on whether he has suffered significant trial-related prejudice. In establishing facts substantiating his claim, 'vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice. [The accused] must show definite and not speculative prejudice, and in what specific manner missing witnesses would have aided the defense' (see *US v Trammell* 133 F 3d 1343 at 1351, quoted with approval in the *McCarthy* case supra, para 47).

[17] It must be considered first that on the facts, the appellant had almost six months, between August 1993 and 26 January 1994, to prepare his defence and decide which witnesses, if any, he would call. After all, he had

no guarantee that his representations would succeed and, as his counsel conceded, it was very shortly before the trial that he was informed of the Attorney-General's decision not to proceed with the prosecution. Save for a vague allegation that SA Linishers ex-employees who were present during the incident (and whom he did not identify) can no longer be traced, the appellant has not contended that there are witnesses whom he intended calling in his defence who, by reason of the passage of time, are no longer available. It is common cause that Picota, whose police statement seemed to favour his case and who probably would have testified on his behalf, is still available.

[18] Second, the appellant did not gainsay the allegation made by Mr Thipe, one of the 'new' witnesses, that whilst two of the eyewitnesses have since died, he knows the whereabouts of the remaining three and is willing to assist in locating them.

[19] Third, the factual matrix of the case is relatively simple and straightforward, the factual issues being in the main whether there was a preceding argument between the appellant and Picota; whether the appellant was angry and whether the vernier slipped or was thrown. If the recent

statements obtained from witnesses are anything to go by, indications are that that those witnesses still have a fair recall of the relevant events. Should it turn out that their memories have dimmed materially, as we were urged by the appellant's counsel to accept 'as a general proposition', that should work to the appellant's advantage as the prosecution's burden to prove its case beyond reasonable doubt will be all the more difficult to discharge. These facts, in my view, fall far short of establishing the requisite prejudice.

[20] Similarly, the other difficulties raised by the appellant's counsel, significantly only as possibilities, such as witnesses' confabulation, inability to properly cross-examine state witnesses by reason of the appellant's own dimmed memory which may lead to adverse credibility findings against him and so on, appear to me to be no more than speculative. Those issues obviously are some of the aspects that the trial court would have to consider, together with the fact of the missing documents – Booysen's initial statement and the investigation diary - in assessing the evidence and drawing the necessary inferences. In *McCarthy*, where the time lapse was as lengthy and the grounds relied on for the alleged trial-related prejudice similar to those advanced in the instant matter, Farlam JA held:

‘[45] The trial prejudice relied on is summarized by Heher J in the passage quoted above where he said that the lapse of 13 years (now 15) since the alleged conspiracy “suggest very strongly that the fairness of the trial will be materially adversely affected, in at least the following respects: the applicant’s recollection of events, the tracking down of such witnesses for the defence as may survive, the willingness of witnesses to testify, the recollection of those witnesses and the procurement of real evidence.”

[46] I do not think the grounds of prejudice listed …are sufficient to justify the far-reaching remedy of an indefinite stay. At least some of the handicaps from which the appellant will suffer may well also render the prosecution’s task more difficult, in particular those relating to the availability 15 years on, of witnesses and their recollection of events. Furthermore these points which will all have a bearing on the question of proof beyond reasonable doubt will be able to be brought to the attention of the jury with all the emphasis at the command of her legal representatives’.

[21] The nature of the crime involved is another relevant factor in the enquiry. This is particularly so in the present case considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instill public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime. (See *S v Jaipal* 2005 (4) SA 581 (CC) para 29.) It is also not an

insignificant fact that the right to institute prosecution in respect of murder does not prescribe. (See s 18 of the Criminal Procedure Act 51 of 1977). Clearly, in a case involving a serious offence such as the present one, the societal demand to bring the accused to trial is that much greater and the court should be that much slower to grant a permanent stay.

[22] In my view, the appellant has failed to establish that he has or will probably suffer trial-related prejudice if he is not granted a permanent stay. Neither has he shown extraordinary circumstances that would justify such an order. The appeal must accordingly fail. There, however, remains the question of costs. The court *a quo* did not make an order of costs having regard to the nature of the proceedings. That approach was correct. This is a criminal proceeding in which the claimant seeks to enforce a constitutional right. Even though the appellant has failed in his claim it was ‘a genuine point on a point of substance’. (See *Sanderson* paras 43-44; *McCarthy* para 51 and *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC) at 911E-F.)

[23] The appeal is dismissed with no order as to costs.

MML MAYA
ACTING JUDGE OF APPEAL

CONCUR:

SCOTT JA
VAN HEERDEN JA

NUGENT JA

[24] I agree with the order that is proposed by my colleague but regret that I cannot agree with the approach that has led to her conclusion. This being a minority judgment I will express my view only briefly.

[25] Whether there has been unreasonable delay in bringing an accused person to trial, and if so, how that should be remedied, calls for a balanced decision that brings to account the length of the delay, the reason the state assigns to justify the delay, the assertion by the accused of his or her right to a speedy trial, and prejudice to the accused from the delay. That was decided in *Sanderson v Attorney-General, Eastern Cape*.[1]

[1] 1998 (2) SA 38 (CC) esp. para 25.

[26] I do not think the balanced decision that is called for by *Sanderson* is capable of being made unless all those factors have been brought to account. For there is no empirical measure against which to weigh any of them in isolation. Each is capable of being accorded its due weight only relative to the others.

[27] If the Director of Public Prosecutions (DPP) has indeed denied to the appellant his right to be brought to trial without unreasonable delay since he was first charged in April 1993 – my colleague has assumed, but not decided, that he has – then in my view the fault of the DPP in doing so cannot simply be overlooked in making the balanced decision that *Sanderson* requires. For if the DPP was at fault, without justification, the balance may shift decisively against him. I am unable to accept that even if the DPP has culpably denied to the appellant for more than ten years his right to be brought to trial promptly, which my colleague assumes to be the case, the appellant is nevertheless not entitled to an order staying any further prosecution in the absence of specific prejudice above the prejudice that can generally be expected to result from the passage of that period of time. For that reason I have found it unavoidable to decide whether the appellant was indeed denied that right, notwithstanding the concession by the DPP's

counsel that he was (a concession of law that seems to me to have been ill-considered) because it might be material to the outcome of the enquiry as to whether the appellant should be granted the remedy he has sought. But the answer to that question has an incidental – yet decisive – effect on my approach to the matter. For the conclusion to which I have come on that question is that the concession was not correct. In my view the appellant had no right to be brought to trial during the period that is now in issue, and thus the DPP cannot be faulted for not having done so. And because the appellant was not denied that right the enquiry that my colleague has embarked upon is not called for at all.

[28] There was no delay in bringing the appellant to trial once he was first charged in April 1993 and the appellant's counsel did not suggest that there was. The submission was that the DPP remained bound to bring the appellant to trial promptly even after the first charge was withdrawn in January 1994 and that he denied the appellant that right from that time until April 2004 when he was charged again.

[29] I do not think the DPP can be faulted for not having brought the appellant to trial during that period, simply because throughout that period

the appellant did not stand accused of having committed an offence, and there was thus no accusation upon which to try him. For the right to be brought to trial without unreasonable delay is a right that protects the integrity of the prosecution process: it accrues to an accused person and endures for only so long as he or she stands accused.

[30] It is not necessary to decide in this case precisely when a person can be said to be an 'accused person' for purposes of s 35(3)(d) and I do not suggest that that requires that he must have been formally charged. But on even the widest construction of that term,[2] I do not think the appellant was an 'accused person' at any time throughout the period that is now in issue. The formal accusation that had been made against him had been withdrawn without any intimation to him that it might be renewed nor any intention that it would be. There is also no suggestion that the withdrawal of the charge was in some way improper or merely a device. On the contrary, the matter remained altogether forgotten in the office of the DPP until the case came to be re-investigated ten years later. Far from accusing the appellant of having committed an offence the DPP did not even suspect the appellant of having done so. Indeed, even the appellant did not consider himself to be standing

[2] Cf *Sanderson*, paras 17 and 18, in which Kriegler J discussed the meaning of 'charged' in the context of s 35(3)(a) of the interim Constitution, and also pointed out that the present section, though differently worded, is 'substantially the same'.

accused of the commission of an offence. I do not think that the appellant can be said to have been an 'accused person', even on the widest construction of the term, if nobody, including the appellant himself, considered that he was standing accused of the commission of an offence.

[29] But it was submitted on behalf of the appellant that because the material facts were known to the DPP he was in a position to accuse him of having committed an offence and ought to have done so and then brought him to trial promptly. Section 35(3)(d) does not confer a right upon a person to be accused of an offence. (That would amount to the introduction of a radically new ground of prescription.[3]) Nor does it confer a right upon a person who has once been accused of an offence not to be accused of it again, which was also counsel's submission. (That would be to make material inroads upon the limitations on the right against double jeopardy.) In its terms the right that is encompassed in s 35(3)(d) is a right to be tried reasonably promptly while a person stands accused of an offence.

[3] In terms of s 18 of the Criminal Procedure Act 51 of 1977 the right to institute a prosecution for any offence other than the offences of murder, treason committed when the Republic is in a state of war, aggravated robbery, kidnapping, child-stealing, and rape, lapses 20 years from the time when the offence was committed.

[30] I do not think the appellant was in that position from the time the charge was first withdrawn in January 1994 until it was renewed in April 2004. In the result he had no right to be brought to trial (whether promptly or otherwise) during that period and the DPP had no corresponding duty to do so and it follows that the DPP was not at fault for not having done so. Indeed, as I pointed out earlier, it also follows that the appellant was never denied a right at all and the enquiry that is contemplated by *Sanderson* is simply not called for. It is for that reason that I would dismiss the appeal.

_____

R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

CACHALIA AJA