

MAXWELL BHURANI
and
FELISTERS BHURANI
and
PHILIMON BHURANI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 17 September 2014

In Chambers in terms of Section 35 of the High Court Act, [Chapter 7:06]

W Chagwiza, appellants' legal practitioners
E Makoto, the respondent's legal practitioners

HUNGWE J: The first and third appellants are brothers to second appellant. They were convicted of stock-theft as defined in s 114 of the Criminal Law (Codification and Reform) Act, [Cap 9:23]. The first and third appellants were each sentenced to six years imprisonment of which two years' imprisonment was suspended for three years on the usual conditions of good behaviour. Second appellant was sentenced to 36 months' imprisonment of which 8 months' imprisonment was suspended for three years on the same conditions. In respect of each appellant, a further 12 months imprisonment was suspended on condition that each accused makes restitution in the sum of US\$500, 00 for the slaughtered bovine to the complainant who is their brother. The remaining four bovines were ordered to be returned to the complainant.

Aggrieved by their conviction as well as sentence, they appealed against both. Although they had initially pleaded not guilty to the charge, and a trial embarked upon, the conviction was not preceded with a reasoned judgment. The reason for this is that during their defence case they all elected to change their pleas to that of guilty. The trial court seized upon the opportunity offered by this change of heart and decided to proceed in terms

of s 271(2) (b) of the Criminal Procedure and Evidence Act, [*Cap* 9:07]. The essential elements of the offence were canvassed from pp 58 to 59 of the record of trial as follows:

“Q: You are admitting that you took five beasts which were in the custody of complainant?

A: (1) Yes. (2) Yes. (3) Yes

Q: Admit that you also slaughtered and took the meat from one of these beasts?

A: Correct.

A: (1) Yes (2) Yes (3) Yes

Q: Any right to do so?

A: (1) No (2) No (3) No

Q Any defence to offer?

A: (1) No (2) No (3) No

Verdict: All guilty as charged.”

Following upon this procedure, the magistrate enquired into special circumstances. Having found such circumstances to have existed, he imposed the aforesaid sentences.

The principal ground of appeal raised by the appellants is that the learned trial magistrate erred in returning a verdict of guilty without enquiring into the reasons for a change of plea to guilty. Put differently the main ground of appeal is that the court a quo erred in convicting the appellants who had pleaded not guilty without giving reasons for finding them guilty although they changed their plea to guilty. Where an accused pleads not guilty and proffers a defence and gives evidence in his or her defence, the court trying his case shall deliberate on that defence and give a reasoned judgement setting out why it has rejected the accused’s defence and his witnesses’ evidence in reference of that given by the prosecution. This is trite.

The magistrate fell into the much too common mistake of seeking the easy way out of an inordinate trial consequent upon a plea of not guilty. It must be pointed out that in cases such as this where the defence of a claim of right was correctly and squarely raised, the court could not avoid the duty to investigate this defence even when the appellants changed their pleas. This duty reposes in the court all the more where unrepresented and unsophisticated accused are unable to formulate such a defence as succinctly as the appellants here did. Their defence was simple. It was that the cattle subject of the charge were part of their deceased mother’s estate. They had repossessed them as part of the process to liquidate the estate of

their late mother which had remained open when the complainant stood to benefit at the expense of the other siblings or beneficiaries.

The facts leading to a change of pleas is fraught with evidence of high-handedness on the part of the trial magistrate. While the appellants were on bail pending trial, they were suddenly, and, for no apparent reason, remanded in custody for the continuation of trial. On the following day of appearance, they offered to change their pleas to guilty. The irresistible inference is that they were coerced by the trial magistrate's action into changing their original plea. The lack of inquiry by the court into the reasons for this sudden change of heart and the failure to deal with the defence of claim of right point to this conclusion. The fact is that the subsequent explanation of the essential elements also fell short of the requirement to exclude a possible defence to the charge because that defence was already on the record. It was for the court to deal with it. (See *S v Musindo* 1997 (2) ZLR 395) A layman has no knowledge of all possible defences open to him when confronted with such a situation as the appellants were faced with. But they were able to articulate a good defence which, despite a "change of plea" remained sticking out like a sore thumb. The deficiencies of the plea of guilty remained. Faced with this state of affairs, the respondent's legal practitioners, correctly in my view, filed a notice to the registrar in terms of s 35 of the High Court Act, [Chapter 7:07] indicating that they did not support the appellants' conviction. It is for the above reasons that I am of the view that the conviction cannot stand. The defence put forward at the opening of their trial was sound. It must be tested by a full trial which trial should result in a reasoned judgement. There is none here. There must be a judgment as the issues raised by the appellants are triable issues. They are entitled to know why their defences were not accepted in a proper judgment.

The conviction of the appellants remained unsound in all the circumstances. They ought to be addressed properly by quashing the present proceedings and ordering that the matter be remitted to the magistrate court for a trial *de novo* before a different magistrate. In the event that the appellants are convicted in the fresh trial they should not receive a harsher sentence than they had been sentenced to in the quashed proceedings.

In the result therefore, I make the following order:

- “1. The proceedings in the matter of State v Maxwell and Others CRB 92-4/10 be and are hereby quashed.
2. The record is remitted back to the Court of the Magistrate at Gutu for a trial *de novo* before a different magistrate.

3. In the event that the accused are convicted, the court shall not impose a sentence heavier than that imposed in the quashed proceeding.”

BERE J agrees _____

Chagwiza & Partners, appellants’ legal practitioners
National Prosecuting Authority, respondent’s legal practitioners