MURAMBIWA LANCE JACKSON
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 1 March and 20 November 2002

Mr *C Marimba* for accused person
Mr *J Mabeza* for the State

CHINHENGO J: The accused appeared before a court of the regional magistrate at Chinhoyi on a charge of theft of a motor vehicle. He pleaded guilty to the charge and was convicted. He was referred to the High Court for sentence in terms of s 54(2) of the Magistrates Court Act [*Chapter 7:10*]. The matter was set down for sentence before me on 1 March, 2002. Before the hearing Mr *C K Mkinya*, then the legal practitioner for the accused had on 15 February, 2002 written a letter to the Registrar in which, among other things, he had advised that he had instructions to apply for a change of plea. At the hearing Mr *Mkinya* applied that his client's plea of guilty be changed to one of not guilty. I was not satisfied that the procedure adopted by Mr *Mkinya* was correct. I was concerned about two issues - first whether it was correct that such an application be made before me in the High Court and second, assuming that the procedure was correct whether I could decide the application on its merits. I then directed the legal practitioners to file heads of argument because the oral submissions which they had made did not appear to me to have canvassed all the points of law which had to be considered. Just after the hearing on 15 March, Mr *Mkinya* renounced agency. I directed that he had to file the heads of argument before he could renounce agency. The legal practitioner for

the State filed his heads of argument on 14 March 2002 and Mr *Mkinya* filed his heads of argument on 31 May 2002 after further insistence by me that he should do so. I intended that the matter be argued in Court and it had to be some time before it could be set down for argument. On 2 September, 2002 the accused's current legal practitioners, Marimba & Partners, assumed agency for the accused. I inquired from them if they intended to file heads of argument different from those filed by Mr *Mkinya*. It was not until 12 November that Mr *Marimba* finally confirmed that he was happy with the heads filed by Mr *Mkinya*. He had had in the meantime to obtain the record of proceedings and to peruse it. As of 5th November none of the legal practitioners intended to make any addition to their heads of argument. I then dispensed with hearing further argument in court.

The allegations against the accused are the following. On 19 October, 2001 at about 2.00 a.m. the accused and his colleague, one James Munodawafa Makumbiza proceeded to the complainant's house at No 12 Msasa Drive, Chinhoyi. There they stole the complainant's motor vehicle a Nissan Hardbody Reg. No. 603 773 E. They drove the motor vehicle towards Murombedzi Growth Point. The accused was driving. At or near the 84 kilometre peg on the Chegutu-Murombedzi road the accused lost control of the motor vehicle and an accident occurred. James Munodawafa Makumbiza died in the accident. Later the accused was arrested. He led the police investigators to the scene of the crime and to the scene of the accident. It was alleged that the motor vehicle was valued at $1 500 000 at the time of the theft and that it was extensively damaged in the accident. When the complainant gave evidence at the trial, he stated that he estimated the cost of repair to be about one million dollars.

The accused pleaded guilty to the charge following upon well conducted proceedings in terms of s. 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Code"). There is nothing on the record of proceedings on which any criticism can be directed at the manner in which the proceedings were conducted.

At the hearing on l March 2002 Mr *Mkinya* applied that the accused's plea of guilty be changed to one of not guilty. He could not immediately satisfy me as to the propriety of that application. I stood down the matter and after he carried out further research he then submitted that the application must be made to the trial court. He submitted that the accused had pleaded guilty because he had been threatened by the investigating police officer with physical assault if he did not plead guilty and that one of the police officers was in court during the plea proceedings. It was for these reasons that he had pleaded guilty to the charge. Mr *Mabeza* for the State opposed the application and submitted that the plea of guilty had been genuine. He urged the court to proceed to pass sentence.

It is apparent that the application to change the plea was based on facts that did not appear on the record. The question arises as to whether the High Court to which the accused was referred for sentence could, without satisfying itself as to the validity of the accused's averments in regard to the plea which he had apparently given freely and voluntarily in the lower court, remit the matter to the lower court for the accused to formally apply to change his plea.

The Code provides in s 227 that when a matter is referred to Court for sentence a judge may exercise the powers conferred on the High Court by s 29(1) and (2) of the High Court Act [*Chapter 7:05*] as he may find appropriate. If the judge is satisfied that

the proceedings in the court *a quo* were in accordance with real and substantial justice he shall sentence the accused without calling upon him to plead to the charge and he shall deal with him as if he had been convicted by the High Court for the offence concerned (s 228 of the Code). In terms of s 29(2)(b)(v) of the High Court Act, a judge may remit the case to the court *a quo* with such instructions relative to further proceedings to be had in the matter as he thinks fit.

The accused in this case alleged that he pleaded guilty because of threats made to him by the investigating police officers whom he named. He alleged that he was threatened with physical assault and that a gun was pointed at him to induce him to plead guilty to the charge. When he appeared in court one of the police officers was present in court to ensure that the accused pleaded guilty. The law with regard to a change of plea has a chequered history in this country arising from the question whether the accused had an *onus* to discharge in order to succeed in an application to change his plea. The law was for a long time one thing in this respect - see *S* v *Haruperi* 1984 (1) ZLR 259; *S* v *Maseko* 1987 (2) ZLR 52 (SC) and *S* v *Nyajena* 1991 (1) ZLR 175 (SC). See also the dissenting judgment of MCNALLY JA and SANDURA AJA (as he then was) in *S* v *Matare* 1993 (2) ZLR 88 (S) and the cases cited therein. The law as enunciated in these cases was altered in *S* v *Matare* (*supra*) by a majority judgment of GUBBAY CJ, KORSAH JA and MUCHECHETERE JA. At 97 B-G in *Matare, supra*, GUBBAY CJ after reviewing the authorities on the subject and analysing the relevant provisions of the Code said:

> "It necessarily follows that the contrary decision in *S* v *Haruperi supra* was wrong.
> In the second place, I have no hesitation in accepting that in so far as a common law application to alter a plea of guilty is concerned, whether made before

conviction or after conviction but prior to passing of sentence, there is no *onus* on the accused to show anything on a balance of probabilities. He must simply offer a reasonable explanation for having pleaded guilty. See *S* v *Moahlodi & Anor* 1962 (2) PH H145 (O); *van Heerden* v *de Kock & Anor* 1979 (3) SA 315 (E) at 316H - 318F; *S v Zwela supra* at 346D-E and 347B-D; *S* v *Pillay supra* at 152B; *S* v *Mazwi* at 348 F - 349E; *S* v *Hazelhurst supra* at 910B-E; *S* v *O* 1990 (2) SACR 145(C) at 152 e. This is simply in conformity with the general principle to which expression was given by LORD SANKEY LC, and hallowed by repetition in several cases, that -

> "Throughout the web of English Criminal Law one golden thread is always to be seen - that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said to the defence of insanity and subject - also to any statutory exception'".
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> See *Woolmington* v *DPP* [1935] All ER Rep 1 HL at 8C.

This Court therefore erred in *Maseko supra* and *S* v *Nyajena supra* in confining the test enunciated by CLAASEN J in *S* v *Britz* 1963 (1) SA 394 (T) to a common law application to alter a plea of guilty only where made before verdict and in holding that, thereafter, the *onus* shifts to the accused to prove on a balance of probabilities that his plea of guilty was not voluntary and understandingly made. (Similar *dicta* in *S* v *Mudimu supra* at 175 I and *S* v *De Bruin supra* at 935 I-J are also wrong). If CLAASEN J's misconception concerning the meaning of 'judgment' is allowed for (see at 397 B) - and certainly the English authorities cited by him used the term in the sense of all stages of the proceedings until the imposition of sentence - then the test was correctly formulated."

The position in regard to this matter is now as succinctly stated in the head note in *Matare supra* that -

> "[Section 272] of the Criminal Procedure and Evidence Act [*Chapter 9:07*] did not oust a common law application for a change of plea to not guilty. In the interests of justice the court has an inherent discretion to permit a withdrawal of a plea of guilty. [Section 272] merely elevates the previous existing common law discretion to a duty in certain circumstances and on certain grounds; if those circumstances existed, the court was bound to order a change of plea whether the accused had asked for it or not; ….
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> … as far as a common law application to alter a plea of guilty is concerned, whether made before or after conviction but before passing of sentence, there was no *onus* on the accused to show anything on a balance of probabilities. He must simply offer a reasonable explanation for having pleaded guilty. Unless the court is convinced beyond a reasonable doubt that the explanation is not merely improbable but positively false, the accused must be allowed a change of plea".

There would be nothing more to add. Cases that came before our courts differ one from the next. Legal principles develop from that difference and the law over time is transformed and reformed in order to deal with the different situations presented by the different cases. All the cases to which reference has been made in this judgment have dealt with the question of a change of plea of guilty on appeal against a magistrate's decision. None of the cases which have been drawn to any attention dealt with an application to change a plea at a hearing in the High Court upon reference of the matter to it for sentence terms of s 54(2) of the Magistrate Court Act. The issues which I have to decide are simply whether that application should be made to the High Court. If it may not be made to the High Court what must the accused show in order that the High Court can decide to remit the matter to the court *a quo*.

The first issue can be disposed of quickly. The substantive application for a change of plea must be made to the trial court, in this case to the magistrates court. It is that court before whom the accused appeared on trial and it is that court which convicted him. A change of plea if allowed means the conviction cannot stand. It is therefore that court which must deal with an application which would affect its verdict. The High Court may not hear or determine such an application.

The second issue is more difficult to deal with. Our law is that in an application to change his plea an accused does not bear an *onus* to show anything on a balance of probabilities. This test applies to a situation where the accused person makes the application to court which has convicted him. Nothing, as I have mentioned, has to my knowledge ever been said about the situation where the accused wishes to change his plea when he is before a different court, in this as in all cases, the High Court for sentence. I

have stated that the substantive application should be made, not to the High Court but to the court convicting him on the charge. The question simply put is : In these circumstances does the High Court, without any investigation of the matter remit the matter to the magistrates court on the mere request of the accused. If the High Court must conduct some inquiry before it accedes to the request what would that inquiry entail? The accused, in this case raised a ground for changing his plea which was similar to the ground raised in the application in *Attorney-General Transvaal* v *Botha* 1994 (1) SA 306 in which SMALBERGER JA considering similar provisions of the South African legislation said at 330 C-E :

> "Grounds for setting aside a plea of guilty such as duress, undue influence and the like arise from events anterior to the proceedings under [s 271] and do not have their origins in that section. They cannot on their own (i.e. without being coupled to a valid defence, …) be brought within any of the situations catered for by [s 272]. The reason is that standing alone they do not raise a reasonable doubt that the accused is in law guilty of the offence to which he has pleaded guilty or that he has a valid defence to the charge. …. nor do they relate to any allegations in the charge ….
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> [Section 272] therefore provides no protection or safety mechanism for an accused who pleads guilty because of duress, undue influence or the like. Yet these are valid grounds under the common law which are frequently raised for setting aside a plea of guilty. In my view it is unthinkable that the legislature could have intended to exclude such common-law rights without any protection being afforded by [s 272]".

I have in the above quoted statement substituted the provisions of our own Act to those of the South African Act to which the learned judge was referring. In *Botha supra* the decision of the court was the same as in *Matare supra* that there was no *onus* on the accused to prove his case on a balance of probabilities.

In my view therefore, if at a hearing of an application to change his plea, the accused is only required to give a reasonable explanation as to his plea of guilty in the

first instance then something less is required of him where he applies to the High Court to have the matter remitted so that he can apply to the appropriate court to change his plea. I think that an accused needs only show that he has an explanation which *prima facie* shows that he has a reasonable explanation for a change of plea to give to the court which convicted him. The High Court need not inquire into the matter beyond satisfying itself that the explanation which the accused will give for changing his plea is *prima facie* reasonable. I do not think that this approach will open the floodgates for accused persons who realise that they are on the verge of going to prison which was the concern expressed by McNALLY JA in *Matare supra* at 106H - 107B.

In the present case it was submitted on the accused's behalf that he had been threatened with physical assault and that a gun had been pointed to his head. It was also submitted that a police officer had sat in court during the plea proceedings. The accused went a step further and mentioned by name the police officers who had threatened him with assault. This, in my view, was an explanation which *prima facie* showed that the accused may succeed in the application to change his plea.

I am of the opinion that the applicant should be permitted to apply to the magistrates court to change his plea. The matter is accordingly remitted to the magistrates court for that purpose.