MACLEAN CHIVAZVE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND MUSAKWA JJ
HARARE, 11 June 2018 & 28 March 2019

Criminal Appeal

S.M. Hashiti, for appellant
F. I. Nyahunvi, for respondent

MUSAKWA J: Having handed down an *ex tempore* judgment a request was made for the written judgment.

The appellant pleaded guilty to two counts of stock theft in contravention of s 114 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9: 23*]. Having found no special circumstances the trial court sentenced the appellant to nine years' imprisonment for each count.

The ground of appeal against conviction is that the court *a quo* erred in proceeding with the trial and convicting the appellant in circumstances where the appellant's uncle had tendered an affidavit in which he was withdrawing the charges and such affidavit had been brought to the court's attention.

As regards sentence it was contended that the court *a quo* erred in not recording the explanation of what constitutes special circumstances with the result that it cannot be determined what it is that was interpreted to the appellant. Thus it cannot be established if the appellant understood the concept of special circumstances. Allied to that, it was further contended that the trial court erred in not considering the complainants' intimation to withdraw charges as a special circumstance affecting sentence.

The admitted facts are that the complainants and the appellant are related. Between January 2013 and October 2016 the complainants handed their cattle to the appellant for safe keeping. Each of the complainants handed over nine cattle. It is not clear if the cattle were handed over in batches as the dates seem to suggest or it is a question of the exact time of

handover not having been ascertained. Between 1 April 2016 and 31 May 2016 the appellant sold one black heifer and one brown bull to Manners Nyikadzino from a neighbouring village. The appellant lied to the complainants that one animal had died and the other went missing. Through investigations by Police and indications by the appellant the stolen cattle were recovered from Manners Nyikadzino.

It is also on record that on the same date of trial, 4th November 2016 affidavits deposed to by the two complainants in which they sought to have the charges withdrawn were placed before the trial court. In the affidavits the complainants advert to the fact that the appellant had apologized. As such they felt that they would not benefit anything from his incarceration and that the cattle were recovered.

Mr *Hashiti* submitted that there was an irregularity on the part of the trial court in that it did not properly assist the appellant who was unrepresented. This was on the aspect that the impact of the affidavits of the complainants was not explained to the appellant. If that had been done the result would have been that the appellant might have had a defence arising therefrom and the matter might have gone to trial. Mr *Hashiti* also criticised the conduct of the trial prosecutor in withholding the complainants' affidavits until the sentencing stage. He cited the case of *Smyth v Ushewokunze And Another* 1997 (2) ZLR 544 (S) in which a prosecutor's conduct among other irregularities led to the filing of a constitutional application in the Supreme Court. Thus Mr *Hashiti* prayed that the matter be remitted for retrial.

Mr *Nyahunzvi* submitted that there was nothing wrong with the conviction. The prosecutor was not bound by the affidavits of the complainants. He commended the prosecutor for producing the affidavits at the sentencing stage.

On Conviction

Ordinarily a person who pleads guilty to a charge preferred against him can only appeal against such conviction if he can prove that he did not freely and understandingly plead guilty. In this respect see *S v Kwainona and Others* 1993 (2) ZLR 354 (S). In that case KORSAH JA said the following at pp 355-356:

"Now, it is entirely a matter for the discretion of the trial magistrate to decide whether a plea of guilty tendered upon arraignment may be withdrawn before sentence: *S v Matare* 1993 (2) ZLR 88 (S). After sentence has been imposed the trial court becomes *functus officio* and cannot re-open the matter.

If a prisoner pleads guilty, and it appears to the satisfaction of the trial magistrate that he rightly comprehends the effect of his plea, his confession, for such it is, is accepted as an

admission either of guilt or of any fact which may tend to prove guilt at his trial. His plea is thereupon recorded, and sentence may forthwith be passed, as was done in the instant case.
There is no rule that a prisoner upon whom sentence has been imposed on his own plea of guilty to the charge cannot appeal against conviction. There is nothing in the Criminal Procedure and Evidence Act which precludes an accused person from appealing against his conviction on a plea of guilty.

The procedure seems illogical, because a plea of guilty indicates that the accused does not join issue with the State. There is no issue between them, no dispute requiring resolution. On what grounds, then, does he appeal? Is he not, in reality, making an application for a change of plea?

Despite the apparent logic of this reasoning, and despite the fact that the "appeal" is treated as an application for a change of plea, the practice has been to allow such a person to appeal. The matter is considered at some length by SCHREINER JA in *R* v *Mambo* 1957 (2) SA 420 (A). He refers to English law authority. He comments that ordinarily such a person, wrongly convicted because he wrongly pleaded guilty, should make representations to the Executive for a free pardon. In exceptional circumstances, however, an appeal will be entertained.
But such an appeal will only be entertained if it is demonstrated that, from the words accompanying the plea tendered, the accused was raising some defence which could legitimately be proffered in defence to the charge. In making such a determination recourse must be had to the facts as alleged and to which the accused made his responses."

In the present matter when essential elements of the two counts were canvassed with the appellant there is nothing in his answers that suggests that he was not freely and understandingly admitting. It is at the mitigation stage that the prosecutor brought to the attention of the trial court that the complainants had deposed to affidavits in which they sought withdrawal of the charges. Forgiveness did not mean that the offences had not been committed. It is difficult to conceive a defence that could arise from such a development.

Concerning the conduct of the trial prosecutor, the case of *Smyth v Ushewokunze and Another supra* that Mr *Hashiti* cited is distinguishable in two respects. In that case the prosecutor was conflicted in that he was related to one of the complainants. Then in the execution of his duties the prosecutor conducted himself is such a manner that it was believed he exhibited bias against the appellant.

It is noteworthy that a prosecutor has unfettered discretion to stop prosecution at any stage before verdict.[1] According to Reid Rowland in *Criminal Procedure in Zimbabwe* the primary consideration in such a case is whether a prosecution is in the public interest. In discussing the attendant factors the learned author had this to say at 3-11:

> "(a)……
> (b)……
> (c)……
> (d) the complainant's attitude. Once a complaint has been made, the Police and the Attorney-General are responsible for the matter. The public interest then becomes the decisive factor. Nevertheless, the complainant's attitude is important. If the complainant indicates a wish to withdraw his complaint, the Attorney-General should consider his reasons for so requesting. The wish to avoid the inconvenience of attending court is of little consequence; but the relationship between the accused and complainant may well be such that if the Attorney-General were to insist on prosecuting more harm would be done than good."

The trial prosecutor in the present matter cannot be faulted. As he was *dominus litus* he was not swayed by the affidavits. The trial was at the public instance. Even if the complainants were desirous of having the charges withdrawn they were not the ones in charge of the prosecution. The matter was now out of their hands. Considerations of public policy must have swayed the prosecutor. In this respect, it is the seriousness with which theft of stock (especially bovines) is regarded as evidenced by the punishment it attracts. That the complainants were willing to withdraw charges would be mitigatory as opposed to a defence as contended by Mr *Hashiti*.

On Sentence

As regards sentence s 114 (3) of the Criminal Law (Codification and Reform Act) provides that:

> "If a person convicted of stock theft involving any bovine or equine animal stolen in the circumstances described in paragraph (*a*) or (*b*) of subsection (2) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded by the court, why the penalty provided under paragraph (*e*) of subsection (2) should not be imposed, the convicted person shall be liable to the penalty provided under paragraph (*f*) of subsection (2)."

As to what constitutes special circumstances, in the case of *S* v *Kudavaranda* 1988 (2) ZLR 367 (H), at 370-371 it was held that:

"To quote from *S* v *Moyo* HH-346-88:

[1] S 8 of the Criminal Procedure and Evidence Act [Chapter 9:07]

"The expressions "special reasons" and "special circumstances", which mean the same thing (see *R* v *da Costa Silva* 1956 R & N 369 at 372C per BEADLE J, as A he then was) have been considered in a number of cases, most recently in *S* v *Mbewe* HH-27-88. A concise statement of their meaning is found in *S v Makaurire* HB-134-84.

'Special reasons are factors arising out of the commission of the offence or peculiar to the offender, which are out of the ordinary, either in their degree or their nature'."

This dictum is a crystallisation of what has been clearly set out in precedents such as S v Ndebele HB-71-82; *S* v *Chisiwa* 1981 ZLR 666 (SC) and *S* v *Dracos* S-100-82."

In explaining the aspect of special circumstances to the appellant, the trial court did not record what it actually explained. Mr *Hashiti* took issue with this as he submitted that the appellant was not properly assisted in appreciating the concept. He buttressed his argument with the submission that to demonstrate that the appellant did not understand the concept this is reflected in his reply which was irrelevant to the issue. In his explanation the appellant stated that he sold the cattle to the dip attendant who had told him the owners did not know about the animals. I do not agree that such an explanation was irrelevant. The explanation must be understood to mean that the buyer told the appellant that the owners would not detect that cattle were missing. As fate would have it, some three years after the handover of the cattle the owners paid a surprise visit to conduct an audit of the cattle. It is plainly evident that no special circumstances can be found from the facts.

Section 114 (4) of the Code prohibits the suspension of the whole or a part of the minimum sentence of nine years imposed. Nonetheless a cumulative eighteen years' imprisonment is unduly harsh, taking into account that the circumstances of the case. It is just that the sentences be ordered to run concurrently.

In the result, the appeal against conviction is dismissed. As regards sentence it is ordered that nine years' imprisonment in the second count shall run concurrently with the sentence in the first count.

CHATUKUTA J agrees