

THE STATE
versus
DILLAN ZARANYIKA

HIGH COURT OF ZIMBABWE
FOROMA & KWENDA JJ
HARARE, 24 November 2021

Review Judgment

FOROMA J: This is a matter which came before me on automatic review. The accused was convicted by the senior magistrate on 7 September 2020 on a charge of contravening s 114 (2) (a) (i) and (ii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Stock Theft) and was sentenced to 46 months imprisonment six (6) of which were suspended for 5 years on condition that accused does not during that period commit any offence involving dishonesty as an element for which if convicted accused is sentenced to imprisonment without the option of a fine.

Another 8 months was suspended on condition of restitution leaving an effective 32 months imprisonment.

A perusal of the record reveals that the accused pleaded guilty to the offence charged. It is the conviction which I find to be improper as will be demonstrated herein below. After the accused was found guilty the court explained to him the seriousness of the offence he stood convicted of namely that in the absence of special circumstances a sentence of not less than 9 years would mandatorily have to be imposed. The court duly explained the meaning of special circumstances before asking the accused to indicate if any special circumstances existed in his case.

When asked if he had understood the explanation of what constitutes special circumstances accused answered as follows:

“A – Yes I did understand and I need time to think before I address you on the issue.”

The court immediately postponed the matter to 9 September 2020 to give accused a chance to consider whether he had any special circumstances to address to the court.

In addressing the court on special circumstances accused highlighted that (i) he sold the bovines because they were sick and he wanted to save his aunt (complainant) from loss in the event the cattle died from the sickness. (ii) That he used the amount realized from sale of the bovines to purchase maize (presumably seed) and fertilizers to enable him to farm at the aunt’s

homestead where he resided. (iii) Aware that the bovines were ill accused's aunt agreed that accused could sell the bovines. (iv) that when the aunt came and asked for the money (purchase price from sale of the cattle) he told her that he had used it and that was all.

In response the public prosecutor submitted that no special circumstances existed and that the accused had breached the trust that had been reposed in him and that consequently the accused should be sentenced to the minimum mandatory sentence.

Fortunately for the accused the court *a quo* did not agree with the public prosecutor and found special circumstances to have been established and on that basis sentenced the accused to a sentence far less than the minimum mandatory sentence.

When the matter came before me in chambers on automatic review I addressed a letter to the magistrate enquiring as to whether the trial court ought not have changed the accused's plea to not guilty in light of the court's acceptance of the accused's submissions on special circumstances. The letter addressed to the senior magistrate read as follows-

"I note that in his address on special circumstances accused indicated that complainant was aware that the bovines were sick and he sold them in order to save the complainant potential loss in the event they died of ill health. He further indicated that complainant agreed that accused could sell the animals when he suggested their disposal (obviously to save her the potential loss). It is clear that the special circumstances which the court found would be a complete defence to the charge of stock theft if established. Should this not have justified the alteration of the plea of guilty to not guilty? Indeed what the court considered as wrongful on accused's part was the conversion of the purchase price of the bovines to his own use but that is a separate offence totally unrelated to the stock theft charge. Please let me have your comment on the foregoing observations."

In response the senior magistrate replied as follows:

"The trial magistrate maintains that the accused committed an offense of stock theft..... the fact that he informed the complainant of the sickness of the bovines is/in the view of the trial court not of significance even if it is to be proved. Theft of stock was committed when accused then formulated an intention to convert the proceeds of stock sales to his own use."

The court *a quo* was clearly misguided. To accused's credit (on the facts of this matter which the court *a quo* ought to have appreciated when special circumstances were being addressed) is that there was no intention to permanently deprive the complainant of her livestock by reason of the fact that on accused's version complainant authorized accused to dispose of the stock in order to save herself the potential loss of the bovines dying from the sickness that they were afflicted by. The fact that complainant consented to the accused disposing of (selling) the cattle removes the gravamen of the offence of stock theft. Quite clearly the court *a quo* could not have dealt with the trial on the basis that what the accused had indicated in his address on special circumstances was an established fact (as it sought to do)

without hearing from accused's aunt. For this reason a full trial needed to be conducted to test the veracity of accused's defence.

In order to do justice to both accused and the complainant the court ought to have proceeded in terms of section 272 of the Criminal Procedure and Evidence Act. That section authorizes the court at any time before passing of sentence to alter the accused's plea of guilty to not guilty and proceed to trial in the event the court is not satisfied that the plea of guilty entered by the accused is an unequivocal admission of both the facts and elements of the offence charged. Section 272 of the Criminal Procedure and Evidence Act reads as follows:-

“272 If the court at any stage of the proceedings in terms of section two hundred and seventy one and before sentence is passed:-

- a) Is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty;
- b) Is not satisfied that the accused has admitted or correctly admitted all the acts or omissions on which the charge is based or
- c) Is not satisfied that the accused has no valid defence to the charge; the court shall record a plea of not guilty and require the prosecutor to proceed with the trial. Provided

It was a serious misdirection for the court (on the facts addressed by the accused in his address on special circumstances) to consider that the accused was still genuinely and legally correctly and unreservedly pleading guilty to the offence charged. The court *a quo* ought to have halted the proceedings and alter the accused's plea of guilty to not guilty and order the state to proceed with the trial as provided in s 272 aforesaid.

In the circumstances the verdict of “guilty as pleaded” was a serious irregularity which cannot give this court any comfort that the accused received a fair trial. Infact the verdict of guilty as pleaded was a serious miscarriage of justice in this matter. In the circumstances the proceedings have to be quashed and both conviction and sentence are hereby set aside. Should the Prosecutor General consider it necessary to re-charge the accused then it is directed that the trial be held before another magistrate on a plea of not guilty. In the circumstances the accused is entitled to be freed from custody immediately.

FOROMA J.....

KWENDA J agrees.....