

THULANI SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 16 & 23 MAY 2019

Condonation for late noting of an appeal

N. Hlabano for the applicant
Ms N. Ngwenya for the respondent

MAKONESE J: The applicant was arraigned before a magistrate sitting at Gweru on the 14th June 2018 facing a charge of contravening section 114 (2) of the Criminal Law (Codification & Reform) Act (Chapter 9:23), stock theft. The allegations being that on 8 October 2017 he stole two cows belonging to the complainant, one Nokuthaba Ndlovu. The applicant pleaded guilty to the offence and was duly convicted and sentenced to 9 years imprisonment after the court made a finding that there were no special circumstances warranting the imposition of a sentence less than the mandatory sentence as prescribed by law. The applicant now seeks to appeal against both conviction and sentence and has applied for condonation for the late noting of the appeal. The state is opposed to this application.

Factual background

On the 8th of October 2017 at around 0800 hours the complainant released his herd of cattle into the grazing lands in the Lower Gweru area at Tununu Village, under Chief Bunina. On the 9th October 2017 at around 20:00 hours the appellant proceeded to the grazing lands and drove two cows belonging to the complainant to his homestead. The applicant approached Michael Sibanda a neighbour aged 18 years, Blessmore Ncube aged 18 years and Frank Nyathi aged 34 years. The trio agreed to assist the applicant in the slaughter of the beasts. One of the cows was tied to a tree. The other cow was quickly slaughtered and the carcass was taken into applicants' house. The applicant and his accomplices were seen by Vincent Ncube slaughtering

the cow. The complainant was alerted and rushed to the scene and found the carcass inside applicant's house. The second cow was still tied to a tree. The complainant positively identified the slaughtered cow as his including the one that had not been slaughtered. The matter was reported to the neighbourhood watch committee. The applicant was apprehended and as he was being escorted to the police station he managed to escape. The applicant was later arrested following a tip off.

On these facts the applicant was taken to court and tendered a plea of guilty. When the essential elements of the offence were put to the applicant he explained that his intention was to slaughter the cows and consume the meat. The accused failed to proffer any special circumstances and he was duly sentenced to the mandatory 9 years imprisonment.

Grounds for the application for condonation

The applicant avers that following his arrest he was heavily assaulted by the police officers who arrested him. He further contends that when he was taken to court on 14th June 2018 the police officers who assaulted him were present in court. He indicates that he advised the trial magistrate that he had been assaulted but the magistrate took no interest in the complaint. Applicant alleges that he was convicted on his own forced plea. As regards the delay in noting the appeal the applicant alleges that no one could assist him to have a lawyer until 26 January 2019 when he managed to relay a message of incarceration to relatives through an inmate who had been released from prison. After his relatives visited him, he managed to engage the services of a legal practitioner.

Whether this application for condonation is properly before the court

In his founding affidavit the applicant avers that his plea was not genuine as he was forced to plead guilty by the police officers who effected the arrest. The police officers were present in court, according to applicant's version. The state's view is that the applicant ought to have sought a review of the proceedings if his complaint was to the effect that there was

irregularity in the conduct of the proceedings. The grounds of appeal as contemplated by the applicant are in the following terms:

- “1. The court *a quo* erred in convicting the appellant on a charge of stock theft before enquiring into the complaint of assault raised by the appellant against the police.
2. The court *a quo* erred in accepting the plea of the appellant as a valid defence before enquiring into the complaint of the appellant. Had it done so, it would have discovered that the appellant’s plea of guilt was not genuine as the subject of the complaint, namely the investigating officer was present in the court room at the material time.
3. The court *a quo* erred in accepting the plea of the appellant when there was no sufficient evidence on the state outline linking the appellant to the commission of the offence. ...”

It will be apparent from a reading of the grounds of appeal against conviction that the applicant is not attacking the evidence as contained in the record. The applicant is, instead, seeking the court to review the proceedings on the grounds that he did not plead voluntarily and without undue influence. I tend to agree with the state that the purported appeal is not supported by the applicant’s own founding affidavit. Applicant does not explain his admission that he intended to slaughter the beasts in question. Applicant does not challenge the evidence in the state outline that directly links him to the commission of the offence. Vincent Dube observed the applicant and his associates slaughtering the cow. The carcass of one of the cows was found inside applicant’s house. The second cow was found tied to a tree in applicant’s homestead. The applicant is clearly and deliberately trying to mislead the court by moving the court away from the facts as contained in the record. The attack of the trial court’s conviction and sentence only on perceived technical irregularities, is a desperate attempt to hoodwink the court into granting the application for condonation. The applicant’s prayer is that a trial *de novo* should be conducted.

It is this court’s view that the prayer for a trial *de novo* is consistent with relief associated with a review. An appeal seeks finality which in this case is that the relief that the applicant is ultimately seeking from this court. The applicant has therefore clearly adopted the wrong procedure by making an application for condonation for the late noting of an appeal. What the applicant ought to have sought is a review of the proceedings. In any event, as I have indicated

in this judgment the applicant does not attack the body of evidence on record. By his own clear admission, the applicant was asked by the trial magistrate what his intention was and he responded by saying that he intended to slaughter the cows for consumption of the meat. All the essential elements were properly put to the applicant and he was correctly convicted. The applicant was sentenced to the mandatory 9 year imprisonment after a finding was made that no special circumstances existed. In the result, the application for the late noting of an appeal is a fishing expedition. There is no serious intent on the part of the applicant to note an appeal against both conviction and sentence. An appeal against conviction can only be entertained if it is demonstrated that, from the words accompanying the plea tendered, the applicant was raising some defence which could legitimately be proffered in defence to the charge. In making such determination recourse must be had to the facts as alleged and to which accused made his response. See; *S v Mudzingwa* 1999 (2) ZLR 225 (H) and the cases cited therein; *S v Kwainona* 1993 (2) ZLR 354 (S) and *S v Mamba* 1957 (2) SA 420 (A).

In *S v Kwainona (supra)* the court held that in exceptional cases the accused may lodge an appeal even where he pleaded guilty and 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 preferred to the charge.

As I have already stated, the proposed notice of appeal does not attack the factual allegations contained in the state outline. When he chooses to deal with that aspect the applicant alleges that the factual allegations in the state outline did not link him to the offence. This of course, is palpably false. The accused was observed by witnesses slaughtering the cow. A carcass was found inside his house. The second cow had not yet been slaughtered but was found tied to a tree in applicant's homestead. The complainant conveniently decided not to deal with the factual allegations against him as they appear in the record.

In the result, this application is not properly before the court and is fatally defective.

I would, accordingly, dismiss the application.

Hlabano Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners