

**THE STATE**

**Versus**

**RAPHAEL SHERENI**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 20 OCTOBER 2005

Criminal Review

**NDOU J:** I dealt with this matter in Harare in 2001/2. The matter was placed before me for automatic review. Before I dealt with the matter on review, the accused, through his legal practitioner noted an appeal and applied for bail pending appeal. Bail was granted by consent. During the bail application, state counsel brought to my attention that the state does not support the conviction and intended to make that concession during the appeal hearing. Because the parties were informed that I had already started writing a review minute in which I proposed to set aside the conviction they agreed that I should go ahead and do so rendering the appeal unnecessary. After the bail hearing the record was misfiled when I left Harare for Bulawayo. This file, and another civil file were located in one of the Bulawayo files. This state of affairs is sincerely regretted.

The background facts of this case are the following. The accused was convicted by a Mutoko Magistrate on three charges of theft of stock. All three counts were treated as one for the purpose

of sentence and he was sentenced to forty-eight (48) months imprisonment with 12 months suspended for 5 years on usual condition of good behaviour. It is common

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cause that the beasts forming subject matter of these charges were found in possession of the accused. The learned trial magistrate rightly observed in her judgment:

"The only issue before this court is to establish whether or not the cattle belong to the accused or whether indeed they belong to the complainant."

The accused's case is that he bought the cattle in the Bindura-Shamva area. It is common cause that the accused produced a document in support of his claim to the village head who testified as a state witness, i.e. John Gorah. The latter said that the accused produced a document. On pages 12-13 the testimony of Gorah cross examined by the accused reveals the following:

"Q I put to you that I had the permit with me but it had been affected by the rain?  
A I do not know because the document that you produced was no longer legible. I could not tell whether or not it was a permit."

Under re-examination by the prosecutor the witness said:

"Q - Did this illegible document look like a permit?  
A The paper was damaged by rain that I could not make head or tail what it was."

The complainant in count 1, Abraham Chitimbe identified his beast as follows. It was brown with short horns facing “o/wards” I can only discern that this means outwards.

Complainant in count 2 Batsirayi Muzengeza described his two missing beasts in the following manner. One was black with one of its

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horns bent downwards. The other was black with white head (The horns were not described for the latter beast). The complainant in count 3, Enock Mushore, described his missing beast as brown and having the tips of its horns chipped off. It is apparent that many beasts fall in the descriptions given by the complainants. There are many brown head of cattle with short horns facing outwards. There are many black beasts with horns bent downwards. There are many black beasts with white spots on the head. There are many brown beasts with tips of horns chipped off. There are no distinguishing features used by the complainants to describe their cattle. In such issues even a plausible witness may make a genuine error on the identification of his stolen/missing bovine. It is for this reason that owners of cattle use brand or other distinguishing marks. In the rural herd mutilation of the beats’ ears is a common way of identifying the cattle with the owners.

The issue here, cannot be resolved by a mere finding on credibility. On account of the so-called presumption of innocence, the general rule of policy requires that the prosecution should

ordinarily bear the onus on all issues – *R v Britz* 1949(3) SA 293(A) at 302, *R v Mabile* 1968(4)SA 811(R) and *Kombayi v S* HB-27-04. The state has to prove all elements beyond reasonable doubt. The onus to prove the case beyond reasonable doubt lies on the state and not on the accused. All the accused needs to do is to put forward a defence which is reasonably true – *S v Dube* 1997(1) ZLR 225 (S); *S v Nziradzepatsa* 1999(1) ZLR 568(H) and *Masuku v S* HB-101-04.

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The accused in this case stated that the cattle in question belong to him and produced a rain damaged document in support of the purchase from the Bindura/Shamva area. In other words, he alleged that the complainants mistakenly identified his beasts as theirs. Theft of stock is, in my humble view, a common law crime whose prosecution is enhanced by statutory provisions – section 3(2)(a) of the Stock Theft Act[Chapter 9:18]. That being the case, the prosecution have the burden of negating all the usual defences – *S v Turk* 1979(4) SA 621 (Z/R) at 622-3 and *South African Law of Evidence* (3<sup>rd</sup> Edition) – LH Hoffman and DT Zeffert at 399-400. From the reading of the judgment the trial magistrate attached a lot of weight to the failure to produce a stock card to prove that the beasts were his. But the record does not reveal that the complainants produced stock cards to prove their ownership of the beasts in dispute. The accused was convicted for failing to

produce documents to support his claim to the ownership of the beasts yet the same was not required of the complainants. Even taking into account the provisions of section 4 of the Stock Theft Act, there is no onus on the accused but a duty to adduce evidence which shows that his explanation for the possession of the beasts might reasonably be true. Once such evidence has been adduced, the onus of proving the explanation to be false or unsatisfactory is upon the prosecution – *R v Ismail* 1958(1) SA 206(A) and *R v Hunt* 1957(2) SA 465(N).

In this case it is not necessary to reject the prosecution evidence in order that the accused should be entitled to acquittal. The essential question is whether on all the evidence there is a reasonable possibility of

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the accused's version being substantially true – *R v M* 1946 AD 1023 at 1026-7.

According to a rule of substantive law possession raises a presumption of ownership which the claimant must rebut. In any proceedings and quite irrespective of the burden of proof, the fact that someone is in possession of a movable is evidence from which ownership may be inferred. The weight of this presumption will, of course, depend upon the circumstances of the case – *South African Law of Evidence, supra* at 466. This works in favour of the accused as he had the beasts in his possession. The trial court determined the question of ownership merely on the basis of credibility of the

state witnesses. The value of observing the witness' demeanour is proper but its importance should not be exaggerated. In circumstances of this case, demeanour can be a very unsafe guide. Demeanour should be allowed only to reinforce a conclusion reached by an objective assessment of the probabilities, or possibly to turn the scale when the probabilities are evenly balanced – *South African Laws of Evidence* at 477 and *R v Masemang* 1950(2) SA 488(A) at 495.

In the main, the accused gave an innocent account of the beasts which may reasonably be true, he must be acquitted even though the court a quo was inclined to disbelieve his account. The state has not discharged its onus on account of the unreliability of the identification of the beasts by the complainants. It was not enough for the trial court to have found that the complainants were honest, the reliability of their observation and

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identification of the beasts as theirs should have been tested. This was not done. If the court knew that the rain soaked document the accused produced to the village head was crucial, it then had an obligation to assist the accused in relation to the production of such document as the accused was unrepresented – *R v Muchena* 1966 RLR 731 at 736; *S v Mutimodyo* 1973(1) RLR 76 (AD) at 80A-C; *S v Musindo* 1997(1) ZLR 395 (H) and *Gomera v S* HH-92-02. It is an essential element of a fair criminal trial that the accused is made aware of his rights so that he does not make mistakes of a technical

nature to his detriment. The trial court has an obligation to explain to an unrepresented accused his rights in respect of procedural matters.

Therefore, in the alternative, the accused was not given a fair trial.

Accordingly, the convictions are quashed and the sentences are set aside.

Bere J ..... I agree