

THE STATE

Versus

REGIS CHAKWENYA

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

P Dzimba for the accused

Criminal Review

NDOU J: The accused was convicted by a Gweru Provincial Magistrate for theft of bovine i.e. five head of cattle. The accused was not represented by a legal practitioner during the trial. He pleaded guilty and the trial was conducted under section 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. He was sentenced to the minimum mandatory sentence of 9 years imprisonment. The matter was submitted for automatic review. Meantime, the accused sought legal representation and Mr *Dzimba*, for the accused, sought to intervene by using the review procedure to attack the conviction. He filed an application attacking the propriety of the conviction. Generally, the accused is not allowed to use the review procedure to attack the conviction. He should appeal against the conviction. It is in very exceptional cases that this court may be prepared to deal the propriety of the conviction on review – *R v Pia & Anor* 1967(1) RLR(G) at 107H; *S v Runganga* 1995(2) ZLR 303(H) at 306G-307E; *S v Hulley* Hb-60-95; *S v Nyathi* HB-90-03 and *S v Stockie* 1980 ZLR 280(G). I do not have to determine whether this is an exceptional case warranting the use of the review procedure to attack the propriety of the conviction. I say so because I have decided to set aside the sentence and refer the

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matter back to the trial court and for a fresh sentence on the basis of a different issue altogether. Once the matter is pending sentence before a magistrate (before sentence) the accused is free to apply to have his plea altered to one of not guilty before the trial court. The issue here is that the trial court imposed the mandatory minimum sentence of nine years without hearing the accused on the question of special circumstances. This is a material misdirection. The accused should have been given an opportunity to address the court on special circumstances. Thereafter the court should have recorded its findings in this regard. This was not done.

Accordingly the sentence of nine years imprisonment is set aside and the matter is referred to the trial court for a fresh sentence.

Cheda J I agree

Dzimba, Jaravaza & Associates the accused's legal practitioners