

EVAN NDOU

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND BERE JJ
BULAWAYO 14 NOVEMBER 2005 AND NOVEMBER 2006

G. Nyoni for the appellant
AV Mabande for the respondent

NDOU J: The appellant was convicted by a Beitbridge Senior Magistrate of Stock Theft that is eleven bovine beasts. At the commencement of the trial he pleaded guilty and was thus convicted on the basis of his plea of guilt. The trial was conducted pursuant to the provisions of Section 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07] After his conviction, the trial was stopped as the trial magistrate opined that he had no sufficient jurisdiction to pass sentence. The matter was referred to the Attorney General in terms of subparagraph (1) of paragraph (b) of Section 225 of the Criminal Procedure and Evidence Act, *supra*. Some twenty (20) days after the conviction, the appellant unsuccessfully applied for bail pending appeal. Nine (9) days later, he sought to change his plea citing Police brutality and hence coercion but failed in his bid. After he failed to withdraw the plea of guilty, he then appealed against the decision. This is the appeal we are now seized with. The background facts are the following;

On 21 May 2005, the appellant in the company of a co-accused only known as Reuben who is still at large, proceeded to Chipala area near Pande Mine. Upon arrival they drove eleven head of cattle which were grazing freely without anyone looking after

HB 118/06

them. They drove the cattle to Malala grazing land where they tendered after them in the bush.

The appellant was then arrested before selling the cattle and his co-accused ran away. The value of the stolen cattle is \$30 million and all were recovered. A reading of the recording reflects that the plea of guilty was taken in judicial conformity with the provisions of Section 271(2)(b), *supra*. The charge was explained. The appellant indicated that he understood all the essential elements of the charge. The trial magistrate seemed alive to the serious nature of the charge that the appellant was facing. He was detailed in his explanation of the essential elements. Of great importance was the appellant's explanatory response to the questions seeking intention for example;

“Q - Do you admit that by acting as you did you sought to deprive the complainant permanently of his beasts.

A - Yes. We wanted to sell them”

There is nothing the appellant said which indicates that he was raising a defence.

This is an appeal against conviction where there has been a plea of guilty. In *S v*

Kwainona 1993(2) ZLR 354 (S) KORSAH JA stated:-

“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 a similar vein in South Africa, in *R v Mamba* 1957(2) SA 420 (A) at 422B

SCHREINER JA had this to say:-

“With us, too, it will only be in exceptional cases that one who has pleaded guilty and been convicted in accordance with his plea will be granted relief on appeal.”

HB 118/06

–See also *S v Mudzingwa* 1999(2) ZLR 225(H) at 227F-H and *S v Nyathi* 1988(2) ZLR 221(HC). In *casu*, it is apparent that the trial court conducted a detail enquiry before declining to allow the appellant to withdraw his guilt plea. Evidence was adduced by both sides on the volition of the plea. The appellant’s application was made well after the verdict but before sentence and as such the trial court had the discretion to allow appellant to withdraw his plea. It seems that the discretion was judicially exercised by the trial.

Accordingly, the appeal against conviction be and is dismissed.

Bere J.....I agree

*Messrs W. Tshakalisa, C/o Majoko and Majoko, appellant’s legal practitioners
Criminal Division, Attorney General’s Office, respondent’s legal practitioners*

HB 118/06