Judgment No. HB 24/07
Case No. HCA 52/03

LUCKSON SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 1 NOVEMBER 2004 & 8 FEBRUARY 2007

J Tshuma, for appellant
A Gaibie, for respondent

Criminal Appeal

NDOU J: The appellant was convicted of two counts of stock theft by a Bulawayo Provincial Magistrate. On count 1, he was alleged to have met up with his accomplice who has already been convicted and sentenced, one Pilate Phiri and hatched a plan to steal cattle within the Esigodini area. To do this, he sent Phiri and one Alphius Ndlovu (still at large) went to Straydom Farm, Esigodini. These two then drove eight (8) head of cattle belonging to Roelf Straydom to the appellant's homestead, arriving there at mid night. The appellant took possession of the cattle and advised the accomplices to come back the next day when the appellant would have arranged a truck to transport the stolen cattle for slaughter. The appellant then kept these cattle in his pen overnight and the following day, he hired a truck to transport the cattle to Denver abattoirs within the Nyamandlovu area. At the abattoir, the truck used to transport the stolen cattle was intercepted by the police who became suspicious of the cattle movement permit which the truck driver had.

Investigations were carried out which led to the arrest of the appellant. All the eight head of cattle were recovered. In respect of count 2, on 9 December 2002, the appellant went to Howman Farm in the Inyathi area searching for cattle to buy. The owner of the farm was not there. Instead, the appellant found four(4) workers there. The appellant allegedly connived with those farm workers to steal six(6) head of

cattle from the farm. In return, the appellant paid the farm workers $110 000,00 which he said they were to share and promised to pay another $100 000,00. The appellant said he

would return that same night to pick up the cattle with his truck. He never came. He came on Monday with the truck and then loaded the six(6) head of cattle assisted by the four(4) farm workers. The appellant then caused the cattle to be slaughtered and was arrested after a tip-off from a member of the public.

The appellant was sentenced to six(6) years imprisonment on count 1 and five (5) years imprisonment on count 2. Of the total eleven (11) years, two(2) years were suspended on condition of compensation and a further three(3) years on condition of good behaviour. He appeals against both conviction and sentence. The appellant is on bail pending the determination of this appeal. I propose to deal with the issues raised on appeal in turn.

Gross procedural irregularity

What is discerned in this regard is that the appellant's case is that he was not subjected to a fair trial because of procedural irregularities. He contended that he was not legally represented and therefore he was completely unfamiliar with the law, the rules of evidence and procedure. Any person who has no legal training who appears in court without legal representation will naturally be unfamiliar. In this jurisdiction he is not alone in this predicament, the majority of accused persons in the magistrates' courts are in the same boat. Like the appellant a substantial number of such unrepresented accused persons face serious offences. This however, does not necessarily render the trial unfair. What renders the trial unfair is its unprocedural conduct. There are common law and statutory procedures designed to ensure fairness. In this case the appellant is a businessman who has been in the business of buying and

selling cattle for seven(7) years. The appellant's case is that he was not specifically asked if he "understood" the charges. A reading of the record of proceedings shows that he pleaded not guilty to the charges after the charges were "put and explained". A detailed outline of the state case was read (explained) to the appellant. He equally gave a chronological and logical defence outline in each count. Nothing seems out of sequence in his outline. It seems to me

that the objective of section 188 (a) and (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] was substantially achieved. He responded to all the material issues raised in the charges. In his defence outline the appellant mentioned all the salient features of his defence. He clearly placed in issue the question of *mens rea – S* v *Mandwe* 1993(2) ZLR 233(S).

Then on the question of cross-examination the appellant contended that the trial magistrate did not ensure that if he did not agree with any of the evidence of the state witnesses, he should cross-examine them and that failure to do so might be held against him. This contention is not borne out by the record. Upon a close reading of the record, it is clear that the appellant understood the purpose of cross-examination. The appellant denied conniving with the accomplices to steal. A few excerpts are indicative of his understanding of the significance of cross-examination. By way of example at page 4 of the record, he questioned one of the accomplices as follows:

"Q - Is it correct that I sent you to steal the cattle?
A - …
Q - If you planned with me, why did you come to my home on several times?"

Again on page 6 –

"Q - Did you not say you had your own cattle for sale?
A - …"

And on page 7 –

"Q - How did I agree with you as you had only seen me once?
A - …
Q - Put it to you that I came with $110 000,00 to buy cattle and I gave it to you.
A - …
Q - Put it to you that I did not brand marks, <u>I did not know they were stolen.</u>
A - …

Q -Put it to you that if I was stealing I would not pay $110 000,00
and come with a lorry the next day.
A - …
Q -Put it to you that I believed the cattle were yours as you selected them among the rest.
A - …
Q - Put it to you that you said you were selling your own cattle.
A - …
Q -Put it to you that after receiving money you planned to lie against me and put me in trouble.
A - …"

The excerpts are not indicative of a person who did not understand the significance of cross-examination. Clearly, the appellant understood, and this ground must fail. The appellant further contends that when he was put to his defence, the record does not show that the trial magistrate explained that he has a right to call witnesses to testify on his behalf. On page 7 the record shows that the statutory rights of the appellant were explained to him. The appellant indicated that he had no witnesses to call. What the appellant seems to imply, here, is that the explanation of those statutory rights should have been recorded, word for word, and inserted by the transcribers when the record of proceedings was being prepared. It is not practical for transcribers to record word for word the explanation given by the trial magistrate.

It is standard practice that the transcriber indicates that the explanation of rights have been made. If this is done as suggested by the appellant it would be time-consuming. In the circumstances, it is found that the appellant received a fair trial.

Failure to apply the cautionary rule on accomplice evidence

It is common cause that the appellant was convicted mainly on accomplice evidence. The state followed the more desirous procedure of calling the accomplice witnesses after they had been convicted and sentenced – *Ex parte Minister of Justice*: in *re R* v *Demingo* 1951(1) SA 36(A). In this case CENTLIVRES CJ stated that while an accomplice is a competent witness,

the practice of calling such witness before such a person has been sentenced is to be deplored and that his credibility will normally be unfavourably affected, since he may hope to receive a lighter sentence if he incriminates the accused. This clearly did not happen in this case.

The appellant avers that there is nothing in the record that shows in the treatment of the accomplice evidence that a cautious approach was adopted by the trial magistrate and in this regard referred to *S* v *Mgengwana* 1964(2) SA 149(C); *S* v *Avon Bottle Store (Pvt) Ltd et al* 1963(2) SA 389 (AD) and *S* v H*lapezula & Ors* 1965(4) SA 439(A). Admittedly, before each accomplice witness testified, the trial magistrate did not clearly endorse that he was going to treat the testimony with caution, he, however, said so in the judgment. On page 3 of the record it is stated:

"The state proved a good case against Accused. Even the accomplice witness [*sic*] gave convincing accounts of these counts. The court applied *Cautorers* [*sic*] Rule in their evidence."

And further, before accomplices Polite Dube and Ernest Gumbo testified, it is recorded "Cautionary Rule applied" This is an indication that he was alive to need to approach the testimony with caution. The approach in such a case was articulated by the Supreme Court in *S* v *Zimuto* SC 124-89 where McNALLY JA stated on page 2 of the cyclostyled judgment:

"But this does not mean that the magistrate must necessarily use a particular form of words. Indeed there have been cases where we have pointed out that a magistrate may say, he is applying the cautionary rule when it is clear that he has not done so. His decision will not be saved simply because he has uttered the magic formula. Similarly, his decision will not be set aside, simply because he has failed to utter the magic formula when it is clear from the judgment that he has applied it. <u>In short, it is the application of the cautionary rule and not its mere enunciation which is important"</u> (emphasis added) and *S* v *Svova* SC-209-88.

From the record it is clear that the trial magistrate appreciated that he was dealing with accomplice witnesses and adopted the requisite caution. There is no basis for faulting him in this regard.

In respect of count 1, there is clear evidence that the stolen cattle were brought to the appellant under the cover of darkness. That is at around 0300 hours. The appellant does not

deny this he merely claims that he did not know that the cattle were stolen. A seasoned cattle dealer that the appellant is, does not usually conduct such transactions at night. The appellant conceded that cattle are not normally sold at night and transported at night. The seller did not even have a permit to transport the cattle. At the time of the interception of the stolen cattle, they were being moved on a dubious movement permit. The evidence of the accomplices is corroborated in a material way by other facts mentioned above. He was found in possession of recently stolen cattle. He was expected to give a reasonable account of the possession. He has failed to do so. The same applies to evidence in count 2. The appellant had previously purchased cattle from the owner of the farm at Howman farm. Once more, appellant does not deny that he ferried and sold the recently stolen cattle.

The trial court in both counts warned itself of the dangers inherent in basing the conviction solely on the evidence of accomplices. It also compared it with that of the appellant to ensure that an innocent person is not convicted. The accomplice

witnesses corroborated one another. This is permissible – *S* v *Machakata* SC-106-89. The convictions in both counts cannot be faulted. As far as sentence is concerned I do not find any misdirection. These were serious acts of theft of stock. A large number of cattle is involved. The stolen cattle were transported for sale. Some of the stolen stock were not recovered. The sentences are in line with those imposed for such conduct at the time of the conviction and sentence – see *S* v *Marowa* HH-94-03 and *S* v *Vhiya* HH-93-03. The sentences imposed are within the discretion of the learned trial magistrate. The appeal against sentence is devoid of merit.

Accordingly, the appeal against conviction and sentence on both counts is dismissed.

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Cheda J

…….. I agree

Webb, Law & Barry, appellant's legal practitioners
Criminal Division, Attorney-General's Office, respondent's legal practitioners