REUBEN ADMIRAL CHINOTSA
versus
THE STATE

HIGH COURT OF ZIMBABWE
OMERJEE AND MUSAKWA JJ
HARARE, 19 AND 31 MAY 2011

Criminal Appeal

O. Shava, for appellant
F. I. Nyahunzvi, for respondent

MUSAKWA J: The appellant was convicted on his plea of guilty to contravening s 28 (2) of the Firearms Act [*Cap 10:09*]. He was sentenced to pay a fine of Z$2 000 or in default, four days imprisonment. He now appeals against both conviction and sentence.

The agreed facts were that on 29 September 2006 and at 2030 hours the appellant drove along Harare-Bulawayo road and upon reaching Selous Shopping Centre he parked his Isuszu KB 250 pick-up truck. He disembarked from the motor vehicle and went into the shop. Upon his return he discovered that his pistol had been stolen from the vehicle.

It is contended on behalf of the appellant that the trial court erred in not permitting the appellant to alter his plea to not guilty. This is because the appellant did not understand the essential elements of the offence.

In order to appreciate the issue at stake it is pertinent to consider the relevant provision of the Criminal Procedure and Evidence Act [*Cap 9:07*]. In this respect s 272 provides that-

"If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed—

(*a*) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or

(*b*) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or

(*c*) is not satisfied that the accused has no valid defence to the charge;

the court shall record a plea of not guilty and require the prosecution to proceed with the trial:

Provided that any element or act or omission correctly admitted by the accused up to the stage at which the court records a plea of not guilty and which has been recorded in terms of subsection (3) of section *two hundred*
and seventy-one shall be sufficient proof in any court of that element or act or omission."

The following exchange transpired during the recording of appellant's mitigation-

'Q- Why did you commit the offence?
A- It's negligence, I left the firearm in the motor vehicle bonnet locked (sic), but it was broken by unknown thieves and the firearm stolen"

It was only during the course of applying for change of plea after engaging legal counsel that an additional explanation was proffered by the appellant. This was to the effect that the firearm was in a briefcase which was hidden behind the seat. This sharply contrasts with the answer the appellant gave during mitigation.

Section 28 of the Firearms Act provides that-

"(1) In this section—
"unauthorized person", in relation to any firearm or ammunition, means any person other than the person lawfully entitled under this Act to possess that particular firearm or ammunition.
(2) Any person having in his possession any firearm or ammunition shall take all such precautions as may be reasonably necessary to prevent such firearm or ammunition falling into the possession of any unauthorized person and shall comply with such security measures, both with regard to the safekeeping thereof and the condition in which it may be kept, as may be prescribed.
(3) When in any prosecution under this section it is alleged in any indictment, summons or charge that all such precautions as were reasonably necessary to prevent a firearm or ammunition from falling into the possession of an unauthorized person were not taken or that any security measure prescribed was not complied with, it shall be presumed, unless the contrary is proved, that all such precautions were not taken or that such security measure was not complied with, as the case may be.
(4) Where any firearm or ammunition is lost or stolen, it shall be presumed, unless the contrary is proved, that it has fallen into the possession of an unauthorized person.
(5) If any person fails to comply with this section, he shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

The charge alleges that the appellant left the firearm in the vehicle unattended. This averment was repeated in the outline of state case and in addition it was further alleged that the appellant had no right to leave the firearm in the vehicle even though its doors were locked.

In light of the provisions of s 28, leaving a firearm in a locked motor vehicle does not amount to taking all precautions that are reasonably necessary to prevent it from falling into the possession of an unauthorized person. It is well known that a motor vehicle may be broken into despite it being locked.

Although the facts put to the appellant were brief it cannot be said that they were insufficient to properly inform him of the essential elements of the offence. This is because during mitigation the appellant was given an additional opportunity to explain why he committed the offence. This is the stage at which he should have further explained that the firearm was in a briefcase which was behind the seat as he subsequently claimed through his counsel.

Even though the appellant was unrepresented during the recording of the plea and essential elements of the charge, there is nothing to indicate that he did not appreciate what he was pleading to. As explained earlier, during mitigation the trial court further asked the appellant why he committed the offence. Surely, if he had an additional explanation from which a doubt could be entertained that he was genuinely pleading guilty, this would have been the appropriate opportunity to do so. I do not think the nature of the charge is such that it required a sophisticated person to appreciate what was required of him.

The question to pause here, as stated by McNALLY JA in *S v Mudambi* 1995 (2) ZLR 274 (S) is, is there a reasonable possibility that an innocent person was convicted? I would answer in the negative. Unlike in *S v Mudambi* supra, in the present case the reasons for seeking change of plea were simply explained by counsel from the bar. This should have been done under oath as in *S v Mudambi* supra and even in *S v Matare* 1993 (2) ZLR 88(S). We are therefore not convinced that the appellant did not understandingly and voluntarily plead to the charge to warrant a change of plea.

Accordingly the appeal is hereby dismissed.

Omerjee J agrees

Mdidzo, Muchadehama & Makoni, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners