JONATHAN CHIKWASHIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 2 July 2014

Concession in terms of section 35 of the High Court Act, [*Cap 7:06*]

P.T. Shumba, for the appellant
S. Fero, for the respondent

HUNGWE J: The appellant was convicted on his own plea of guilty to a charge of stock theft as defined in s 114(2) of the Criminal Law(Codification and Reform) Act, [*Cap 9:23*]. The matter was adjourned prior to sentencing. In between time, the appellant then unrepresented, applied for a change of plea unsuccessfully. The trial court, finding that there were no special circumstances, imposed the minimum sentence of 9 years imprisonment. Appellant thereafter engaged legal counsel who applied for alteration of a guilty plea to one of not guilty. Appellant's application was made in terms of s 272 of the Criminal Procedure and Evidence Act, [*Cap 9:07*].

Three grounds were advanced in explanation of the tendering on a guilty plea. The first reason was that the appellant alleged intimidation and undue influence by the police; secondly the appellant claimed that he was ignorant of the consequences of the plea of guilty; and finally appellant contends that the facts which he admitted to did not disclose an offence in light of the decision of this court in *S* v *Machokoto* 1996 (2) ZLR 190. That application suffered the same fate. He now appeals to this court against his conviction.

Five grounds of appeal are advanced on behalf of the appellant. The first and main ground of appeal is that the court *a quo* erred in dismissing appellant's application to withdraw his plea of guilty. The remaining grounds are a rehash of the same reasons put forward on appellant's behalf regarding his earlier application. The notice and grounds of appeal appear to be muddled up. The reasons could be that the appellant's legal practitioner was unsure as to what

it was he was now bringing on appeal; the refusal to grant the application to withdraw the guilty plea before counsel was engaged or the subsequent dismissal of counsel's application for changing of the plea? What would constitute the proper grounds of appeal in the present appeal? The appellant's apparent confusion would have been much less if counsel had born in mind that the reasons given in the final determination by the court *a quo* dismissing the application for change of plea provided him with the reason why he was approaching this court by way of an appeal rather than review.

I will proceed to determine whether the concession by the respondent was well made.

In terms of s 272 of the Criminal Procedure and Evidence Act, the court is required to record a plea of not guilty if any of three situations become apparent at any stage before sentence is pronounced. The first situation is when the court, for any reason, entertains doubt that the accused is in law guilty of any offence to which he has pleaded guilty. The second situation is where the court is not satisfied that the accused has correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based. Finally, the court is bound to alter the plea to one of not guilty if it is not satisfied that the accused has no valid defence to the charge.

In *S* v *Maseko* 1986 (2) ZLR 52 (SC) it was held that an accused who wishes to change a plea of guilty after verdict has been given must discharge an onus showing on a balance of probabilities that the plea was not voluntarily, understandingly and correctly made. In order to succeed, the accused only needed to show, on a balance of probabilities, that the plea was not voluntarily and correctly made. However that position was significantly altered by the same court in *S* v *Matare* 1993 (2) ZLR 88 (SC) when it was held that the accused has no onus cast on him before his wish to change his plea can be granted. All that he is required to do is to give a reasonable explanation of why, in the first place he has pleaded guilty to the offence charged. It is only when the court is satisfied that the explanation tendered by the accused is beyond a reasonable doubt false that the court can refuse to alter the guilty plea to one of not guilty.

In the present case, once the accused made an application to change his plea before sentence, as he did, the court *a quo* was require to determine whether the explanation he gave for pleading guilty initially was, beyond reasonable doubt, false.

In *S* v *Matare* (*supra*) after discussing the different approaches dictated by either the common law or the statutory provisions here and in South Africa, GUBBAY CJ stated (@p98B-99B):

> "Third, in my view s 255A, construed in the context against which it was introduced to the Act, contains no indication of an intention on the part of the legislature to cast an onus on the accused. That this is so is evident from the following factors:
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> (1) The phrase "if the court ... is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty" in para (a), merely requires that a doubt alone, and not a probability, is sufficient to oblige the court to change the plea. No onus of proof needs to be discharged before this safety device becomes operational. See *S* v *Malili en 'n Ander supra* at 624A
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> (2) The phrase "if the court ... is not satisfied that the accused has admitted "all the essential elements of the offence" in para (b) requires no more than that the accused reveals that he does not admit an essential element of the offence. See *S* v *Malili en 'n Ander supra* at 624C.
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> (3) The phrases "if the court ... is not satisfied that the accused has ... correctly admitted all the essential elements of the offence" and "... has no valid defence to the charge", in para (s) (b) and (c) respectively, deal with the situation where the accused does not dispute any of the essential elements of his guilt, but during the proceedings it becomes apparent that he has wrongly or mistakenly pleaded guilty. The court is then obliged to change the plea. The word "satisfied" means that the court must have a reasonable doubt about the correctness of an admission or of the conviction it returned. See *S* v *Malili en 'n Ander supra* at 625F-I."

It is apparent to me that sec (s) 255(2)(b) and 255A were enacted to provide greater protection to the undefended accused by establishing an inquisitorial procedure, as were sec (s) 112(1)(b) and 113 of the South African Act. See *S* v *Dingile supra* at 258B-G. Not only, therefore, is the placing of an onus of proof on the accused incompatible with such a procedure, it undermines the protection the accused enjoyed prior to 19 September 1975, when guilty-plea proceedings were framed in the adversarial mould. The court placed no onus on an accused who wished to change his plea; a reasonable doubt as to its correctness sufficed. If it became apparent that an undefended accused had wrongly or mistakenly pleaded guilty the court was required to investigate the matter inquisitorially and, if necessary, change the plea *mero motu*. See *S* v *Terblanche* 1971 (3) SA 231 (O) at 235C; *S* v *Hendriks* 1977 (4) SA 78(C) at 80F.

In sum, I can do no better than to repeat the words of van ZYL J in *S* v *Fourie supra* at 23h, that:

> "(there is) no more of a burden of proof in an application under s 113 than the burden placed on the accused by the common law in these circumstances. In fact, in my respectful opinion it is even wrong to talk of an onus at all in these

> circumstances, because this is not like the ordinary case of the burden of proof. All that can be expected of an accused is to give an explanation or clarification of his change of plea, and, if the court is satisfied that it is a reasonable explanation on clarification, then the plea ought to be changed. There is no question of a burden of proof that is discharged in such a case" (in translation).”

It is clear that the trial magistrate fell into error when he delved into the merits of the appellant’s case in order to determine whether his application for a change of guilty plea ought to succeed. The question was not whether appellant’s case, as explained by his counsel during submissions in the hearing, carried with it any prospects of success. The issue remained whether he had put forward an explanation for the guilty plea which, in the circumstances, was beyond reasonable doubt false. If an unrepresented accused states that he tendered the plea in the belief that he had no defence and it appeared, upon being counseled, that there is doubt as to whether the accused is indeed guilty of the offence charged, in my view, the application ought to succeed.

In light of the above, I am of the view that the concession was well made. The appeal succeeds and the conviction is quashed. The sentence imposed in the court *a quo* is set aside. The matter is remitted back for trial *de novo* before a different magistrate.

BERE J agrees _____

Mutendi & Shumba, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners