

THE STATE

Versus

FINIYASI MAREMBA alias ANAARAS SHUMBA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 24 OCTOBER 2002

Criminal Review

NDOU J: The accused is aged 26. He was charged with and convicted of setting ten wire snares at Barberton Ranch, Mberengwa in contravention of section 5 (as read with section 30(1)(a)) of the Trapping of Animals Act [Chapter 20:21]. He caught a male kudu. Nothing turns on the conviction.

The prosecutor produced accused's previous conviction dated 19 February 2002 for which he was convicted for theft. Part of this conviction reads:

“The remaining 2 months imprisonment with labour are suspended for 3 years on condition accused does not within that period commit any offence of which dishonesty is an element and upon conviction accused is sentenced to imprisonment without the option of a fine.”

The public prosecutor thereafter addressed the court in the following terms:

“PP Accused has a previous conviction. He also defaulted community service work ... State applies that the 2 months suspended on 19 February 2002 be brought into effect.”

The accused thereafter stated that he had no objection to the prosecutor's application. The above-mentioned suspended sentence of two months was brought into effect in addition to the sentence of five (5) months imposed. When the matter was placed before the scrutinising Regional Magistrate queried:

“If accused was convicted in this instant case for breaching the statutory provisions of section 5 of the Trapping of Animals Act [Chapter 20:21] did he breach the conditions of the suspended sentence on CRB ZVI 223/02 which caused the magistrate to bring into effect 2 months imprisonment with labour? Is the trial magistrate of the view that the element of dishonesty suffices in this case or the trial magistrate adopted the general view that any commission of a criminal offence amounts to dishonesty irrespective of the type of the offence?”

The trial magistrate did not concede her error. She responded “... I am of the view that there is an element of dishonesty on the part od (sic) the accused. He set up ten wire snares. In the communal areas, he could easily catch wild animals or he could catch domestic animals resulting in someone losing a donkey, cow or a goat. Accused knew that setting up of a wire snare is prohibited. He continued to do so.”

It is trite that conditions of suspension must be appropriate to the crime and formulated with such precision that the accused clearly understands the ambit of the condition. If there is any doubt as to how a condition should be interpreted, the doubt must be resolved in favour of the accused – see *Criminal Procedure in Zimbabwe* by *John Reid Rowland* at 25-46.

A condition that the accused does not commit any offence involving dishonesty would not apply to any offence committed i.e. interpreting dishonesty in a generic sense. Dishonesty in the suspended sentence refers to the category of offences such as theft, fraud, forgery and uttering, robbery etc but certainly not setting of wire snares. The weight of judicial opinion is overwhelmingly in support of this position as articulated by the scrutinising Regional Magistrate – see *S v Ndlovu and Ors* 1979 RLR 236 (G) and *S v Damane and Another* 1969(4) SA 47 (O). The argument by the trial magistrate is not characterised by legal rationality. It borders on

nothing else but mere arrogance or unwillingness to accept constructive criticism. As alluded to as are our courts have dealt with this issue in a number of cases.

Generally, it does seem that two principles at least should be observed in the imposition of the condition. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of the suspended sentence. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition – see *R v Cloete* 1950(4) SA 191 (OD) at page 192 and *S v Valashia* 1973(3) SA 934 (OPD).

In suspending the first sentence on 19 February 2002 the magistrate had in mind offences of a kindred nature. Setting of wire snares is not. In this regard in the case of *R v Burke* 1967 RLR 105, DAVIES J, said at p 106E-F:

“I think it is clear that, where a person is convicted of theft or some such similar offence, and a sentence is suspended on condition the accused does not commit another offence involving dishonesty, the court has in mind offences of a kindred nature to theft.”

According to BEADLE CJ in the case of *S v Van Beck and Anor* 1972(1) SA 452 [R] at page 453C;

“The test, therefore, as recognised in the case of *R v Burke* supra, is whether, in suspending the sentence, the magistrate had in mind the type of offence for which the accused was subsequently convicted.”

In dealing with this question JARVIS AJA in the case of *R v White* 1968 (3) SA 556 (RAD) stated at p 558G:

“It was open to the magistrate to be more specific had he so wished, and if there was any doubt in the matter, as I think there may well be, the narrower construction should be the construction which should be given to the meaning of the expression ‘any offence involving dishonesty.’”

It is clear that setting of wire snares in contravention of section 5 of Trapping of Animals Act [Chapter 20:21] is not *sui generis* the crime of theft. In *R v Brown*, 1908 TS 211, SOLOMON J, in considering whether an accused had earned his livelihood by dishonest means, remarked that the word “dishonest” should be construed in its ordinary sense, that is to say, there must be an element of fraud, to say the least, in the manner in which the accused obtained his livelihood. The word “dishonest”, however, in some other context may have a wider meaning. In the Shorter Oxford Dictionary one of the meanings given is:- “disposition to deceive, defraud, or steal.” Even this wider meaning does not support the trial magistrate’s argument in this *in casu*. The suspended sentence of 2 months imprisonment imposed on 19 February 2002 should not have been brought into effect. Instead, the trial magistrate should have dealt with the question of suspended sentence of 3 months which was suspended on condition the accused performed community service. It can be gleaned from the prosecutor’s submissions in the court *a quo* that the accused somewhat defaulted on this one. The record does not show what action, if any, took in this regard. The value of the male kudu has to be altered to the statutory value applicable at the time.

In the circumstances I make the following orders:

1. The conviction of the accused is hereby confirmed.
2. The sentence of 5 months imprisonment is hereby confirmed.
3. The part of sentence which reads “In addition to that 2 months imprisonment with labour suspended by the magistrates’ court at Zvishavane on 19 February 2002 have been brought into effect” is set aside.
4. The value of compensation to be paid to Barberton Farm is altered from \$26 000,00 to read \$8 000,00.

5. It is directed that the trial magistrate attend to the question of the alleged default by the accused on performance of community service.

Cheda J: I agree