

**THE STATE**

**Versus**

**FUNGAI CHOVAVA**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 30 JANUARY 2003

Review Judgment

**CHEDA J:** This is a review of the above matter forwarded to me on 9 October 2002. On perusal I noticed an anomaly on the sentence which I raised with the learned trial magistrate who has acknowledged the error.

The brief facts are that accused was charged with two counts.

Count 1 - involves the contravening of section 5(a) as read with section 30(1)(a) of the Trapping of Animals Control Act [Chapter 20:14].

Count 2 – Stock theft

On count 1 he is alleged to have set one class 1 wire snare and caught a cow valued at \$10 000 and stole the meat. There are three issues which the learned trial magistrate seem to have overlooked.

1. Sections 5(a) and 30(1)(a) of the Trapping of Animals (Control) Act is not [Chapter 20:14] but [Chapter 20:21].
2. Section 30(1)(a) which stipulates penalties reads;  
“Any person who is guilty of an offence specified in section five shall be liable –
  - (a) On a first conviction, to a fine not exceeding two thousand dollars or imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
  - (b) ...;

The sentence of 30 months imprisonment with labour is therefore unlawful as it exceeds that which is stipulated in the Act.

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3. Count 2 is in my view a duplication of count 1 because the act of setting a snare, catching a cow and the subsequent removal of the meat emanates from one act. The two charges have been split, while this is permissible it has to be done in accordance with certain laid down principles based on decided cases. The test for splitting charges was laid down in *R v Peterson & Others* 1970(1) RLR 49 where it was held per BEADLE C J at 51 F-G

“... where a man commits two acts, of which each, standing alone, would be criminal but does so with a single intent and both acts are necessary to carry out that intent, then he should only be convicted of one criminal offence. Another commonly applied test, which is a useful one in certain circumstances, is that the same evidence which is essential to prove one criminal act should not be used again as essential evidence to prove another. Where the essential evidence in such cases proves two criminal acts, only one should be charged.”

The accused set up a snare, his sole intention was to catch an animal, presumably game, obviously for the pot. He instead, caught a cow whose meat he took away. The intention was to kill a wild animal using a snare. The fact that instead of catching game he caught a domestic animal, in my view, does not split his intention to commit a crime into two which can justifiably result in the creation of two offences. It will be improper, in my view, to charge accused with two counts all emanating from the same *mens rea*. Therefore, applying the test referred to *supra* splitting of the charges would be improper as it results in a serious prejudice to the accused.

The learned trial magistrate ordered the forfeiture to the state of the class 1 snare, nothing turns on this compensation order.

In addition he ordered compensation to the owner of the cow killed as a result of trapping. Presumably this was in terms of section 19 of the Act under discussion which reads;

### **Section 19(1)**

“where a person is convicted of an offence specified in section five, six or ten and –

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- (a) the person convicted has appropriated or disposed of any wild animal which forms the subject of the charge and which has not been restored to the land which it has trapped; or
- (b) the commission of the offence has caused the death of a wild animal or has made it necessary or expedient for a wild animal to be killed; the court shall in addition to any penalty which it may impose on the person convicted, order him to pay the appropriate authority for the land on which the wild animal was trapped such amount as may be specified in terms of section (2) in respect of the wild animal concerned.”

Section 2 empowers the Minister of Environment and Tourism to specify amounts to be paid for different species of wild animals.

Two problems arise in the magistrate’s compensation order. Firstly, the above section only refers to a wild animal, therefore a cow does not fall within that category. It is therefore illegal to treat a cow under that section. Secondly, in the event that the learned trial magistrate sought to exercise his powers in terms of the Criminal Procedure and Evidence Act Chapter 9:07 that could have arisen under Part XIX. While he is indeed empowered to make an order for compensation, the code, lists

- (i) types of losses for which compensation can be paid and
- (ii) the procedure to follow in making such compensation

Should a party require compensation an application has to be made under section 368 which reads;

### **Section 368**

- “(1) A court shall not make an award or order in terms of this paragraph unless the injured party or the prosecutor acting on the instructions of the injured party applies for such an award or order.
- (2) A court shall ensure, where appropriate and practicable, that any injured party is acquainted with his rights to apply for an award or order in terms of this part.”

There is nothing in the record to indicate that such an application was made. It therefore stands to reason that in the absence of such an application the learned trial magistrate was not empowered to order compensation in this matter. While I accept and acknowledge complainant’s right to compensation such right has to be insisted

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upon by himself and not by the court. See *R v Bidi* 1969 RLR 75 at 77 and *S v Gundu* 1989 (2) ZLR 161 HC 162E-164A. The conviction is otherwise confirmed in count 1.

In the light of the above the following order is made:

- (a) The charge in count 1 is amended to read as follows “contravening section 5 (a) as read with section 30(1)(a) of the Trapping of Animals (Control) Act Chapter 20:21.
- (b) The sentence is set aside and substituted by the following:
- (c) “ 24 months imprisonment with labour of which 6 months imprisonment with labour is suspended for 5 years on condition accused does not within that period contravene section 5 of the Trapping of Animals (Control) Act Chapter 20:21 for which upon conviction is sentenced to imprisonment without the option of a fine.”
- (d) The class 1 wire snare is forfeited to the state.
- (e) The conviction and sentence in count 2 is set aside.

Ndou J ..... I agree