Judgment No. HB 39/2004
Case No. HC 1783/03
CRB B 294-6/02

THE STATE

Versus

EPHRAIM NYONI

And

FRANCIS MUKWEBU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 1 APRIL 2004

Criminal Review

NDOU J: The accused persons were convicted by a Beitbridge Magistrate on three charges. In count 1 they were charged with setting three class I traps (wire snares). In count 2 they were charged with stealing two oxen. In count 3 they were charged with setting one class I trap. Nothing turns on the conviction and sentence in count 3. The agree facts in respect of counts 1 and 2 reflect, *inter alia*, the following:-

> "On 5 December 2002 the accused … proceeded to Majuta Farm, Beitbridge where they set three class one wire traps, … saw two oxen and drove into two of the snares. The two oxen were then caught as a result of the accused's act."

From this extract and what the accused persons said in court it is clear that they set the wire snares in order to facilitate the theft of two head of cattle in count 2. When they set the snares their sole intention was to catch these two oxen. In answer to my query, the learned trial magistrate accepts that there was an improper splitting of charges. The accused persons' *mens rea* was to steal the two oxen. As rightly pointed out by CHEDA J in *S* v *Chovava* HB-16-03, it is improper to charge with two counts emanating from the same *mens rea*.

In *casu*, the charges in counts 1 and 2 emanate from essentially the same criminal act. The accused persons' conduct really constitutes one transaction motivated by a single purpose of stealing the two oxen. There is no substantial difference between the ingredients of the two charges in counts 1 and 2 and as such there is an improper splitting of charges. These facts are distinguishable from those in *S* v *Chinemo* 1985 (1) ZLR 32 (HC); *R* v *Khan & Ors* 1948 (4) SA 868; *R* v *Steenkamp & Ors* 1957 (3) SA 168.

There are two main tests as to whether there has been an improper splitting of charges. These were aptly summed up by BEADLE CJ in *R* v *Peterson & Ors* 1970 (1) RLR 49 at 51F-G as follows:

> "… 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."

R v *Sabuyi* 1905 TS 170; *S* v *Ndhlovu*; *S* v *Ngwenya* 1971 (2) RLR 190 (G); *R* v *Gordon* 1909 EDC and *Criminal Law in Zimbabwe* by J R Rowland at 10-26 to 10-28.

Accordingly, I quash the conviction and set aside the sentence in count 1. The proceedings are otherwise confirmed as being in accordance with real and substantial justice.

Chiweshe J …….. I agree