PETER THOMAS ZULU

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MATHONSI JJ
BULAWAYO 7 NOVEMBER 2011 AND 10 NOVEMBER 2011

Mr S Nkiwane for the appellant
Mr T. Hove for the respondent

Criminal Appeal

MATHONSI J: The appellant was convicted by the regional magistrate's court in Hwange of one count of stock theft in contravention of section 114 of the Criminal Law Code [Chapter 9:23]. He was sentenced to eleven (11) years imprisonment of which two (2) years imprisonment was suspended on condition he makes restitution to the complainant in the sum of US$600-00 on or before 31 March 2010 being the value of the beast that was stolen.

He has appealed against both conviction and sentence and has submitted that in the event that the appeals against conviction and sentence do not find favour with the court, the matter should be referred to the Supreme Court in terms of section 24(2) of the Constitution of Zimbabwe on the basis that the mandatory sentence of 9 years for stock theft prescribed by section 114, is an inhuman and degrading punishment which is proscribed by section 15(1) of the Constitution.

The state case is that the appellant was employed by the Ministry of Justice as the messenger of court for Hwange. One Mackenzie Ndebele had a dispute with his wife, Sibusiso Ndlovu, after the latter had sold certain matrimonial property pursuant of a court order granted in her favour by the magistrates court. Mackenzie obtained a High Court order for the return of the property is question which included a scotch cart box in the custody of the complainant Mike Ndlovu, who had bought it from Sibusiso Ndlovu. The High Court order was to the effect that each of the parties was to bear its own costs.

By letter dated 12 February 2007 (exhibit 1), *Cheda and Partners*, the legal practitioners representing Mackenzie, instructed the appellant to proceed to recover their client's property in terms of the court order. The letter reads in part as follows:

> "The Messenger of Court
> P O Box 99
> **Victoria Falls**
>
> Dear Sir
>
> **RE: MACKENZIE NDEBELE VS SIBUSISO NDLOVU: CASE NO. 1539/05.**
> We refer to the above matter and attach hereto copy of a court order directing your office under paragraph 1b to recover all the property taken away from our client under case number CC13/03. Such property includes certain cattle which our client has managed to locate.
> To that end we attach hereto for your reference copies of the application for review and advise that our client will accompany you to recover certain head of cattle which belong to him and are in the custody of other people following distribution by Sibusiso Ndlovu.
> He shall liase (sic) directly with you concerning your fees. We await your return of service which you have to give to our client.
>
> Yours faithfully
> (signed)
> CHEDA AND PARTNERS"

In pursuance of those instructions and in execution of the court order, the appellant demanded that Mackenzie pay him ZS$8 million and 60 litres of fuel to cover his execution costs. When that was done, he, in the company of Mackenzie proceeded to Lusulu, Binga to recover property from villagers who had it, including the complainant from where he intended to recover the scotch cart box. He did not recover the scotch cart box as the complainant insisted on being refunded the purchase price he had paid to Mackenzie's wife.

Sometime in June 2007 the appellant made another trip to Lusulu with Mackenzie but before doing so, he charged him another 60 litres of fuel and Z$4million as his costs. The appellant told Mackenzie that he wanted to punish all the people who had resisted with the property by charging them a beast each.

Upon arrival in Lusulu, the appellant gathered people including the veterinary officer and some police officers at the complainants homestead. Unfortunately both the complainant

and his wife were away from home. They had left three (3) children, the oldest of whom was aged 13, looking after the home. The appellant demanded an unspecified sum of money as his execution costs and when none was given, he directed that the cattle be penned. Whereupon he selected "a very fat heifer" which he said was equivalent to Z$15 million. It was unprocedurally cleared for slaughter.

After the heifer was slaughtered the appellant took it in his car without skinning it and left for Hwange. In his defence, the appellant stated that although the complainant was not a party to the proceedings between Mackenzie and his wife and there was no order for him to pay the execution costs, he had to slaughter the heifer to recover his costs of travelling to Lusulu on two occasions. He did not explain why this was necessary when he had already levied the costs of execution against Mackenzie.

The court a quo found that the state had proved its case beyond a reasonable doubt and having failed to find special circumstances as would entitle the appellant to a sentence other than the mandatory one, it sentenced him aforesaid.

The appellant was not happy with the decision of the court a quo and launched this three pronged appeal. In respect of conviction Mr *Nkiwane* for the appellant submitted that the seizure and slaughter of the complainant's beast did not constitute theft as defined in section 114(2)(a) of the Criminal Law Code as the circumstances under which the beast was taken, in execution of a court order, transformed the *actus reus* from unlawful to lawful. He went on to argue that the appellant lacked the requisite *mens rea* in that h e subjectively believed that he was entitled to recover execution costs from the judgment debtor. He took the view that the fact that the appellant observed all the formal requirements for slaughtering a beast by involving the village head, the veterinary service and the police shows that the appellant subjectively believed that he was acting lawfully and this entitled him to the defence of "claim of right."

I do not agree. Section 114(2) under which the appellant was charged provides;

"(2) Any person who –
(a) takes livestock or its produce-

(i) knowing that another person is entitled to own, possess or control the livestock or its produce or realising that there is a real risk or possibility that another person may be so entitled; and

(ii) intending to deprive the other person permanently of his or her ownership, possession or control, or realising that there is a risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control; or

(b) ---; or

(c) ---; or

(d) ---

Shall be guilty of stock theft and liable-

(e) if the stock theft involved any bovine or equine animal stolen in the circumstances described in paragraph (a) or (b), and there are no special circumstances in the particular case as provided in subsection (3), to imprisonment for a period of not less than nine years or more than twenty-five years."

In *casu*, the appellant knew that the complainant was entitled to own, possess and control the heifer. Notwithstanding such knowledge and intending to permanently deprive the complainant, proceeded to take the beast using his position as the messenger of court. This was done in the absence of the complainant. In my view the actions of the appellant fell within the provisions of section 114.

The appellant was armed with a court order in which only Mackenzie Ndebele and Sibusiso Ndlovu were parties. That court order specifically provided that "there shall be no order as to costs," meaning that neither of the named parties was to bear the other's costs.

What is more, the complainant was not a party cited in the court order he was executing and neither was he directed to bear the costs of execution. Indeed the appellant went on to issue a notice of attachment (exhibit 2) in which, not only was the complainant's name conspicuous by its absence, but the property being attached was a scotch cart.

That notwithstanding, the appellant inexplicably proceeded to attach, slaughter and take away the complainant's heifer. The appellant did not even take away the heifer for sale by public auction, as would be expected of a messenger of court executing a writ. According to the appellant's own witness, Andrew Chihembekedza who was driving the appellant, they took

the carcass straight to the appellant's home even as it had not been skinned. We can only speculate what happened to the carcass thereafter.

There can be no worse case of impunity by a court official. Here is an official of the court who has no less than 13 years experience, who should be taken to know pretty well that he cannot just seize people's property without the authority of the court and has been paid anywhere, but who decides that he would arrogate to himself the power of the court and award himself costs he scarcely deserved.

The appellant was a law unto himself when he got to Lusulu on that assignment. It was for this reason that he blissfully told Mackenzie that he would appropriate a beast each from those villagers who resisted his overtures. In doing so he was acting outside the law and nothing can turn this unlawful misadventure into a lawful one as Mr *Nkiwane* would want the court to believe.

In respect of the sentence, Mr *Nkiwane* submitted that the court *a quo* fell into grave error in sentencing the appellant to a term in excess of the mandatory minimum sentence. He relied *inter alia* on an order that I granted by consent, with CHEDA J concurring, in *S v Goredema* HCA 198/10. In that case the trial court had convicted the appellant of stock theft and sentenced him to 13 years after failing to find special circumstances. 1 year was suspended on condition of good behaviour while 3 years was suspended on condition of restitution. As in *casu*, neither the complainant nor the prosecution had applied for an order for restitution in terms of section 368(1) of the Criminal Procedure and Evidence Act [Chapter 9:07].

The state conceded that the trial court had misdirected itself by *mero motu* ordering restitution.

Section 365 of the Criminal Procedure and Evidence Act empowers a court convicting a person of unlawfully taking another person's property to restore it or an equivalent amount. However, one should not lose sight of the peremptory provisions of section 368(1) of that Act which provides:

> "A court shall not make an award or order in terms of this Part unless the injured party or the prosecutor acting on the instructions of the injured party applies for such an award or order."

In the present, the record shows that only the appellant made an offer to make restitution. Neither the complainant nor the prosecution made an application for restitution. It was therefore incompetent for the court *a quo* to *mero motu*, make such an order.

Looking at the penal provision in section 114, it is clear that the legislature wanted to impose a deterrant penalty for what it regarded as a prevalent crime. The penalty provided for is severe enough without the court having to add on to it. Granted the sentencing court has a discretion to impose a sentence of up to 25 years but there is nothing to suggest that the legislature intended to accord the court the power to suspend part of that sentence where no special circumstances exist.

In any event it is part of our sentencing principles that where a court considers suspending part of a sentence subject to conditions, it must make it possible for the affected person to fulfil the condition. *S v Mukura and others* 2003(2) ZLR 596 at 599H-600A. A person already serving a minimum sentence of 9 years would have no motivation to restitute even if the court was entitled to suspend part of the sentence.

The appellant stole a single beast and not a herd. He was treated as a first offender. In my view the mandatory sentence of 9 years met the justice of the case. I would therefore dismiss the appeal against conviction but partially uphold the appeal against sentence.

It remains for me to deal with the application for a referral of the matter to the Supreme Court on the basis that the mandatory sentence infringes section 15 of the constitution. Mr *Nkiwane* submitted that the mandatory sentence amounts to inhuman and degrading punishment because;

> "A person who steals a piglet valued at US$2,00 is subjected to the same penalty as a person who steals an exhortic (sic) pedigree bull valued at US$5000-00."

The fallacy of this contention is self evident in that while the definition of livestock in section 114 embraces all sorts of animals including a pig, the mandatory sentence complained of is confined to theft involving "any bovine or equine animal" This argument therefore suffers a still birth.

Mr *Hove* for the respondent strongly argued that or for any question to be referred to the Supreme Court it must meet the prerequisites contained in section 24(2) of the constitution. That section provides;

> "If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court, unless, in his opinion, the raising of the question is merely frivolous or vexatious."

Mr *Hove* submitted that the application for a referral is frivolous and vexatious and must be dismissed for that reason. The effect of section 24(2) was discussed by GUBBAY C J in *Martin v AG and Another* 1993(1) ZLR 153(S) at 157C –E where he said:

> "In the context of section 24(2) the word 'frivolous' connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word 'vexatious', in contradistinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party, in the full appreciation that it cannot succeed; it is not raised *bona fide* and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless--- --.
> To my mind, the purpose of the descriptive phrase is to reserve to subordinate courts the power to prevent a referral of a question which would amount to an abuse of the process of the Supreme Court."

Section 15(1) of the Constitution is aimed primarily at the quality and nature of punishment. It also extends to punishment which is inhuman and degrading in its disproportionality to the seriousness of the offence in that no one could possibly have thought that the particular offence would have attracted such a penalty. *S v Ncube and Others* 1988(1) SA 702 ZSC) at 715 G-H.

I have already stated that the application had a false start in that Mr *Nkiwane* proceeded from the erroneous premise that every livestock falls under the mandatory sentence of 9 years. In *S v Anand* S -205-88 which is cited in *S v Arab* 1990(1) ZLR 253(S) at 256E the Supreme Court took the view that a sentence of 3 years imprisonment with labour in a country in which imprisonment is not generally held to be inhuman or degrading, cannot, standing alone, be said to violate s15 (1) of the Constitution.

More importantly, the Supreme Court ruled in *S v Arab (supra)* that a provision imposing a mandatory minimum sentence was not inhuman and degrading, nor did it create a punishment which is disproportionate to the offence because the power of the trial court to consider and find special circumstances allowed for a sentence which is not necessary disproportionate.

The same principle applies in the present case where the penal section allows the trial court to impose a sentence other than the mandatory 9 years where special circumstances exist. It is only in those cases where no special circumstances are found that the court's sentencing discretion is taken away.

To my mind, this court has a duty to satisfy itself that the application for referral to the Supreme Court has merit. *In re: Chinamasa* 1999(2) ZLR 291(H). If the raising of the constitutional question is frivolous or vexatious then the court must purposely refuse to refer the matter in order to guard the process of the Supreme Court against abuse. I am of the view that the raising of the constitutional question in this matter is indeed frivolous and vexatious.

In the result, I make the following order.

(1) The appeal against conviction is hereby dismissed.

(2) The appeal against sentence is upheld with the result that the sentence of 11 years imprisonment is set aside and in its place is substituted the sentenced of 9 years imprisonment.

(3) The application for a referral to the Supreme Court is hereby dismissed.

Kamocha J agrees……

S. Nkiwane the appellant's legal practitioners
Criminal Division, Attorney General's Office, the state's legal practitioners