

2467/05

(1) THE STATE

Versus

**TENDAI NHEMBO
EDZAI MHLAURI**

(2) THE STATE

Versus

**DERECK GAMA
BRAIN MACHUMA
DESIRE MAKOKERA
ARON MAKONI**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 8 DECEMBER 2005

Criminal Review

NDOU J: These two matters were dealt with separately by the same Provincial Magistrate sitting in Gweru. I have dealt with them in one judgement out of convenience as the issues are similar.

In the Nhembo case, the accused persons were jointly charged with house breaking with intent to steal and theft. The allegations are briefly that the accused persons were both employed as general workers by the complainant at Mount Pleasant Farm Haibenpark, Gweru. They broke into the premises by forcing the kitchen door to open. They stole property valued at \$8 600 000,00. Property valued at \$6 000 000,00 was recovered. Each accused was sentenced to a fine of \$500 000 or in default thereof, 1 year imprisonment. In addition, 2 years imprisonment all of which was

suspended on the usual conditions of good behaviour and restitution.

HB 125/05

In the Gama case, the gang of four accused persons proceeded to Whamu Farm, Lalapanzi. They went there under the cover of darkness. They arrived at around 4 am. From one of the farm boreholes they stole a 12 hose power electric motor. They took it to a neighbouring resettlement area. They told the trial magistrate that their intention was to sell the electric motor. The electric motor is valued at \$20 million and was recovered. They were each sentenced to a fine of \$500 000,00 or in default thereof one (1) year imprisonment. In addition two(2) years all of which was suspended on condition of good behaviour. The learned Provincial Magistrate rightly highlighted the prevalence of such offence on the farms. The moral blameworthiness of the accused persons was rightly found to be very serious. However, the sentences imposed are not consistent with the finding of serious conduct by the offenders. The above mentioned sentences trivialise these serious offences. Custodial sentences were called for in light of the seriousness of the offences. From the facts, imprisonment is a sad necessity. Farmers are vulnerable to such thefts and these thefts can easily destabilise farming activities if not checked. Because of the location of farms, detection of such thefts and arrests of offenders is very difficult. This is case of misplaced sympathy by the trial magistrate. The moral blameworthiness of the offender

must assign both the quality and quantity of a just penalty. The determination of an equitable quantum of punishment should chiefly bear a relationship to the moral blameworthiness of the offender – *S v Shoniwa* HB-37-03; *S v Chitoto*

HB 125/05

HB-36-05; *S v Sparks & Anor* 1972(3) SA 396 (A) and *S v Moyo* HH-63-84. By over emphasising the offenders' personal circumstances and

correspondingly under estimating the moral blameworthiness the trial magistrate mis-directed himself. In the absence of special mitigatory features custodial sentences in the region of two(2) and three(3) years respectively were called for.

Accordingly, I am unable to certify the proceedings in both matters as being in accordance with true and substantial justice.