HB 183-15
HCAR 34-15
CRB W 579-80-14

THE STATE

Versus

PHILLIMON LUNGA

And

COSTA MADZORE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 17 & 24 SEPTEMBER 2015

Criminal Review

TAKUVA J: The two accused persons were convicted of three counts of stock theft in contravention of section 114 (2) (a) (ii) of the Criminal Law (Codification and Reform) Act Chapter 9:23.

The facts in respect of count 1 are that on 16 November 2014 the two acting in common purpose proceeded to Madumabisa grazing area where they drove a herd of cattle including a brown bull belonging to the complainant to Themba Chauke's homestead. Once at the homestead, they penned the cattle and slaughtered the complainant's bull. After that, they sold the meat to Themba Chauke.

Subsequently, on 28 November 2014 the two, again employing the same *modus operandi* slaughtered a bull belonging to the complainant and sold the meat to Themba Chauke. Finally, on 3 December 2014 the two acting in common purpose drove complainant's herd to Themba Chauke's homestead where they slaughtered one cow belonging to the complainant and sold the meat to Themba Chauke. Both accused persons were arrested while looking for a buyer for the cow's head.

The two pleaded guilty and were convicted on all three counts. The trial magistrate found no special circumstances and sentenced them as follows:

> "All counts taken as one for sentence:
>
> Each accused - 25 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition each accused person is not convicted of any offence of which dishonesty is an element committed within that period for which he is sentenced to imprisonment without the option of a fine."

I then raised a query in the following terms:

> "Since the court found no special circumstances, the appropriate minimum sentence is nine (9) years per count, making a total of 27 years imprisonment. That being the case why were accused persons sentenced to 25 years imprisonment? In any case is it competent to suspend a portion of that sentence?"

The trial magistrate replied thus:

> "The trial magistrate would like to apologise for such a gross mistake. The trial magistrate concedes with the honourable judge that the sentence of the two accused persons is improper, seeing that they were facing three counts of stock theft and stock theft has a mandatory sentence and the trial magistrate was supposed to sentence them to imprisonment for 27 years and not suspend any portion of the sentence.
>
> This was an oversight on the part of the trial magistrate, such a mistake will not occur in future."

There are basically two errors that have been conceded to by the trial court. Firstly, it is incompetent to pass a sentence that is lower than the minimum penalty prescribed by the legislature. Secondly, it is impermissible to suspend all or a portion of the mandatory minimum prison sentence. See s 358(2) as read with paragraph 3 of the Eighth Schedule of the Criminal Procedure and Evidence Act Chapter 9:07. The paragraph specifically prohibits any suspension of sentence relating to any offence in respect of which any enactment imposes a minimum sentence and any conspiracy, incitement or attempt to commit any such offence. See also *S* v *Kudavaranda* 1988 (2) ZLR 367 (HC) where it was held that under section 337(1)(b) as read

with the Sixth Schedule of the Criminal Procedure and Evidence Act (Chapter 59) the trial court had no power to suspend any portion of the minimum sentence. Note that the relevant provisions are now contained in section 358 (2) of the Criminal Procedure and Evidence Act Chapter 9:07 as read with paragraph 3 of the Eighth Schedule thereof.

For these reasons the sentence imposed by the trial court being incompetent is hereby set aside. The matter is remitted to the court *a quo* to enable the magistrate to recall the accused persons and sentence them as directed. Prison officials are directed to deduct the period that the accused persons have already served prior to the alteration of their sentences.

Kamocha J …… I agree