

THE STATE

Versus

JAGGER ALBERT SIBANDA

IN THE HIGH COURT OF ZIMBABWE
KABASA & DUBE-BANDA JJ
BULAWAYO 23 JUNE 2022

Criminal review

DUBE-BANDA J

1. This matter was placed before me on automatic review in terms of section 57 (1) of the Magistrates Court Act [Chapter 13:11] (The Act). The accused appeared before the Magistrates' Court sitting in Gweru. He was charged and convicted with one count of contravening section 114(2)(a)(ii) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 24 March 2022, at Plot 22 West Gwelo Block, accused and an accomplice who is part of this review stole two heifers the property of complainant. Accused was convicted on his own plea of guilty and the trial court having found no special circumstances he was sentenced to eighteen years imprisonment, i.e. nine years imprisonment *per* beast.
2. The brief facts are that complainant is grandmother to the accused. Accused was employed by complainant as a farm hand. On the 24 March 2022, accused stole complainant's two heifers and sold them for USD\$400.00 each to a third party. The value of the stolen stock was USD\$800-00 and everything was recovered.
3. The conviction is proper and nothing turns on it, it is the sentence imposed on the accused that I take issue with. Accused was charged with one count of stock theft, and he was sentenced to eighteen years imprisonment. In the reasons for sentence the trial court said: "the court had no option but to impose the mandatory term of eighteen years as there are two bovines involved."

4. The penal provision is section 114 (2) (e) provides that if the stock theft involved any bovine and there are no special circumstances accused must be sentenced to imprisonment for a period of not less than nine years or not more than twenty-five years. My reading of the penalty provision does not imply that the sentence should be *per* beast. I am of the view that an accused charged with one count involving more than one bovine should be sentenced *per* count not *per* bovine. This explains the reason the legislature escalated the maximum period of imprisonment to twenty-five years, it cannot be said by any stretch of imagination that a court convicting an accused for theft of one bovine would be at large to sentence such accused to a period of twenty-five years. My view is that the twenty-five years maximum is to cater for those cases where an accused is convicted of one count of stock theft involving more than one beasts. The punishment must turn on counts and the sentencing court may, depending on the facts of the case increase the sentence *per* count depending on the number of beasts involved.
5. Stock theft remains a public scourge in this country and it is regarded as serious and worthy of a direct term of imprisonment. The penal provision for stock theft shows that the legislature wanted to impose a deterrent sentence in respect of this prevalent crime. Notwithstanding its prevalence and seriousness the legislature could not have intended to punish the theft of one beast with a maximum of twenty-five years. See: *The State v Zhakata* HH155-22; *Lucas v The State* HH 105/18.
6. The jurisprudence in this jurisdiction is that a minimum mandatory sentence of nine years is *per* count not *per* bovine. In *Mamoche v The State* HH 80/15 the accused was convicted of one count of stock theft involving two bovines. He was sentenced to 18 years imprisonment. On appeal the court said:

As regards sentence the State conceded that because the learned trial magistrate did not give reasons for imposing 18 years for a single count of stock-theft that omission entitled this court to interfere with the sentence. By statute, the court is obliged to impose a minimum of 9 years imprisonment per count. It could impose a stiffer sentence if the circumstances set out in s 114 (2) (e) are proved. The court did not find any special circumstances to have existed. It was obliged to impose the minimum sentence applicable. It settled for a heavier sentence without giving reasons therefor. Such a sentence cannot

be allowed to stand. The appellant was convicted for the normal theft of stock or its produce. The normal sentence should follow. In light of the above therefore, the sentence imposed in the court a quo is set aside and in its place the following is substituted: "9 years imprisonment." (My emphasis).

7. In *S v Takawira & Another* HH 75/15 the accused persons were convicted of one count of stock theft involving two beasts. They were each sentenced to twenty years imprisonment. The court said:

Pruned down to the bare bones of the matter, the accused persons were convicted of one count of stock theft and the mandatory sentence for that is 9 years imprisonment in the absence of special circumstances. What appears to have played on the mind of the magistrate is the fact that 2 beasts were involved. He probably thought that theft of each beast and not the count should be visited with its own 9 years imprisonment. Otherwise how else can one explain the sentence of 20 years? Whatever the case, it was a misdirection calling for interference with the sentence.

In my view, the mandatory 9 year term is deterrent enough and considering that 2 beasts were involved a further term of imprisonment suspended on condition of future good behaviour is sufficient recognition of the number of animals involved.

8. In *Takawira supra* the court sentenced each accused to twelve years imprisonment of which 3 years imprisonment was suspended for 5 years on the usual conditions. Leaving an effective sentence of nine years.

9. In *S v Mhoya* HB 79/13 the accused was charged with one count of stock theft involving three beasts. He was sentenced to twenty-seven years imprisonment. The court said:

The accused stole three herds of cattle in the course of one act of theft. The magistrate seems to have multiplied the mandatory sentence of 9 years by the number of cattle. This is a clear misdirection.

10. In *S v Huni* HH 149/09 the court said in the absence of special circumstances an accused person will be sentenced to an effective mandatory minimum sentence of nine years for each count that he is convicted of. Where the accused person has been convicted of more

than one count, to treat both or all of them as one for purposes of sentence defeats the clear intention of the legislature for the imposition of an effective mandatory minimum penalty of nine years per count.

11. I have read the judgment of this court in *S v Shoko* HH 679/19 and I respectfully have sufficient disagreements with its reasoning and/or conclusions to justify not following it. I do not agree that where an accused steals more than one bovine in a single act he must be charged with as many counts as the number of the beasts involved, and sentenced accordingly. I also had the opportunity of reading the judgment of this court in *The State v Zhakata* HH155-22. I agree with its approach and conclusion because it accords and is in sync with the jurisprudence in this jurisdiction. In the *Zhakata* case the court held thus:

For reasons stated above, I am compelled to depart from this court's decision in *S v Kudakwashe Shoko-supra* whose import is that where an accused steals more than one bovine animal in a single transaction he commits and must be charged with several counts of stock theft. The reality is that where he does so with a single intent and the same evidence required to prove one count is essentially the same needed for the proof of the other, only one count must be preferred regardless of the number of bovine animals stolen.

I agree with this conclusion.

12. Although this case is not about conviction but sentence, the same principle applies with equal force.
13. In *casu* accused was charged and convicted with one count of stock theft. The count involved two bovines. It was irregular and incompetent to sentence the accused *per* mandatory minimum imprisonment *per* beast. Quite clearly the sentence imposed by the trial court is irregular and incompetent and has to be reviewed and set-aside. Accordingly, the conviction is confirmed but the sentence has to be altered.

14. In the light of the incompetence of the sentence I have the power on review to set it aside and impose a new sentence that is in accordance with the law. Such a sentence cannot be allowed to stand. The accused was convicted of one count of stock theft. He should be sentenced correctly and in terms of the law. In light of the above therefore, the sentence of eighteen years imprisonment imposed by the trial court must be set aside and substituted.

In the result:

- i. The conviction is confirmed.
- ii. The sentence imposed by the trial court be and is hereby quashed and set aside and substituted with the following:

Accused is sentenced to nine years imprisonment.
- iii. The trial magistrate is directed to recall the accused and explain to him the new sentence.

Kabasa J I agree