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THE STATE
versus
GARIKAI MUGABE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 2 April 2003

Criminal Review

HUNGWE J: The accused was jointly charged with one Aleck Phiri when he pleaded guilty to a charge of housebreaking with intent to steal and theft and another of theft of stock. As he had pleaded guilty whilst his co-accused pleaded not guilty, their respective trials were duly separated.

The accused's trial proceeded in terms of section 271 (2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07].

The agreed facts in respect of the first count were that on 23 November, 2002 the accused proceeded to the complainant's homestead at 2000 hours. He approached a storeroom whose door was closed but not locked and opened it. He entered and removed "one knapsack and one jack". He sold the knapsack sprayer in Glendale but the jack was recovered upon his arrest. The value placed on the jack is \$10 000,00 and on the knapsack is \$40 000,00.

An hour later the accused approached the complainant's goat pen, drove out one goat and slaughtered it. Part of the goat meat was recovered from his kitchen the following day. This forms the basis of the

second charge. The goat was valued at \$3 000,00.

The accused was sentenced in count one to 18 months and 24 months in count 2. Out of the total of 42 months only 6 months were suspended on condition of good behaviour. The trial court awarded compensation in the sum of \$3 000,00 to the complainant for the goat he lost.

In his reasons for sentence the Provincial Magistrate remarked - "Incidents of this nature for which Accused has been convicted are prevalent in this area".

Indeed housebreaking with intent to steal and theft and stock-theft may be prevalent in the area where this matter arose. It is proper for the magistrate to have taken into account the fact of prevalence. Further these are serious crimes. The Courts have always regarded housebreaking with intent to steal and theft as a serious crime as it involves a violent invasion of the privacy of the home and threat to the right to private enjoyment of one's property. It is not far fetched to state that it is the most abject type of theft. The same can be said of theft of stock.

Stock theft has always been regarded as serious by both the Courts and the legislature for a very long time. At one stage a minimum of 9 (nine) years imprisonment awaited anyone convicted of Stock theft (see Stock Theft Act Chapter 72]. The value of stock to an agricultural economy obviously drove this reasoning. But again a very wide variety of offences can be embraced by the Act, from theft of heard of cattle to the stealing of a fowl.

However these factors must not be allowed to outweigh the

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circumstances relating to each particular case.

As was pointed out by FIELDSEND CJ in *State v Sibanda* 1980

ZLR 470 at 471 E -

"But the prevalence of the offence must not be given too much weight in the assessment of sentence".

**Citing HERBSTEIN J in *R v Loofer* 1952 (2) P.H.H. 160
FIELDSEND J (as he then was) in *R v Shaba* 1964 (1) RLR 162
remarked -**

"The accused person ought not ordinarily to receive a more severe punishment than is merited by the offence which he has committed because the offence happens to be a common one. The necessity of deterring other persons from committing similar offences must be taken into consideration but must be weighed with the facts of the particular case".

These remarks are apposite in this case. The accused is a young first offender; married with one child. He has no formal employment nor does he have much in the form of assets. His personal circumstances show that his plea of guilty was a genuine expression of contrition.

As to the circumstances surrounding the commission of the crimes of theft, it cannot be said that the first was the worst case of housebreaking and theft. Nor can it be said that theft of a goat is the worst type of stock theft. The sentence imposed in this particular case is too severe and harsh.

In *State v Munzutu & Another* HH 58/88 it was held that 2 years of which 6 months is suspended was an appropriate sentence for theft of an ox which was subsequently slaughtered.

A comparison of that sentence with the present one renders the

present so harsh as to induce a sense of shock. Had the magistrate given due consideration to all the relevant factors that are to be considered, a more appropriate sentence would have been found to be much lighter than the one imposed. There is no evidence that community service was considered. The courts must always investigate the desirability of resorting to this sentencing option and show why it has not been preferred in the reasons for sentence.

Since the community service of hours or months has been increased to cater for sentences up to 24 months, it follows that quite a good number of sentences could be reduced to community service where appropriate.

Another aspect I find disturbing in this case is the reference in the charge sheet, to the -

"Stock theft as defined in the Stock Theft Act".

Several judgments have been written pointing out the fact that this is a common law crime for which there is no need to cite reference to the Act. It is not necessary to refer to the Act where an accused is charged for common law theft of stock. I have amended the charge by deleting any reference to the Act.

The trial court presumably acting in terms of Section 362 of the Criminal Procedure and Evidence Act [Chapter 9:07] awarded compensation to the complainant in the sum of \$3 000,00 for the goat. That award is incompetent. Any such awards can only be made on application by the complainant or the prosecution. As the prosecution or complainant did not make such an application it was incompetent for the court *mero*

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***motu* to make the award - (Section 368 of the Criminal Procedure and Evidence Act [Chapter 9:07]). The award of compensation is therefore set aside.**

Complainant still retains his right to sue for compensation for the loss of his goat as he did the right to sue for the knapsack sprayer that he lost on the first count.

In the premises as the trial magistrate erred in his approach to sentence this court is at large in respect of sentence. The conviction is confirmed but the sentence is altered as follows:

"Count (1) : 6 months imprisonment

Count (2) : 6 months imprisonment

Of the total of 12 months imprisonment 3 months is suspended for 3 years on condition the accused does not during that period, commit any offence of which dishonesty is an element for which he is sentenced to imprisonment without the option of a fine".

KAMOCHA J, agrees.