

HH 93-03
Crb 1240/02
THE STATE
versus
HERBERT VHIYA

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 18 June, 2003

Criminal Review

HUNGWE J: The accused faced two counts of Stock Theft. The facts agreed between the State and the accused that in the first count accused stolen an ox and sold it to a butchery operator. It was recovered before it was slaughtered. In the second count, the complainant was not so lucky as the butchery operator had already slaughtered and sold it.

The accused pleaded guilt to both counts. He was sentenced to 3 years and four years imprisonment respectively with 18 months of the total suspended for a period on conditions. Compensation was awarded to the complainant whose ox was slaughtered.

The Stock Theft Act [Chapter 9:18] sets the maximum term of imprisonment for Stock Theft at 6 years. There is no longer a minimum mandatory sentence. So for theft of any number or cattle the maximum a court can impose is 6 years. Clearly that maximum should be reserved for the worst type of case of theft of stock. The general sentencing trend reflects that for theft of one head of cattle 20 to 36 months was imposed. Where, as here theft of two head of cattle occurred within the same month a cumulative sentence of 7 years, albeit part of it was suspended is too harsh. The Court ought to have considered the cumulative sentence. Had it properly done so it would have realised that the effective sentence of 7 years with 1½ years suspended was excessive.

In that regard the trial court misdirected itself on its approach to sentence. This court is therefore at large on sentence.

The trial court ordered that compensation be awarded to Mudavanhu whose ox was slaughtered. In making the order the court must have acted in terms of Part XIX of the Criminal Procedure and Evidence Act [Chapter 9:11]. Section 363 of that Act permits a court which has convicted a person of an offence to award compensation to the person whose right or interest in the property has been lost or diminished as a direct result of the offence. That compensatory fine shall always be coupled by an alternative custodial sentence not exceeding 12 months. (Section 10(4)). The order for compensation imposed in this matter could not have been in terms of the Stock Theft Act. As such, it is liable to be set aside on the grounds that it was incompetent for the trial court to have imposed it.

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In the premises the sentence imposed by the trial court is set aside and the following imposed -

"Count 1 3 years imprisonment

Count 2 4 years imprisonment. The sentence in count 1 is ordered to run concurrently with that in Count 2. Of the resultant effective sentence 4 years imprisonment, 18 months imprisonment is suspended for five years on condition the accused does not with that period commit any offence of which theft of stock is an element for which he is sentenced to imprisonment without the option of a fine".

The accused is to be recalled and the alteration of his sentence explained to him.

KARWI J, agrees:.....