

HH 94-03
Crb N 486/03
THE STATE
versus
JUSTICE MAROWA

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 25 June, 2003

Criminal Review

CHINHENGO J: The exercise of the sentencing discretion by a judicial officer offers a wide scope for balancing various interests in the administration of justice with a view to doing justice in a particular case. The exercise of that discretion is subject to compliance with the approach taken by the superior courts in similar cases. If a judicial officer does not have regard to the guidelines provided by the superior courts, he is likely to impose sentences which are off the mark. This case is illustrative of the point.

The accused pleaded guilty to theft of two oxen. He was sentenced as follows -
"\$80 000/12 months iwl. In addition 12 months iwl which is wholly suspended for 5 years on condition accused does not within that period commit any offence involving dishonesty in particular stock theft for which he is sentenced to iwl without the option of a fine".

The sentence as worded attracts criticism. It is not necessary to state that the imprisonment is "with labour". See s 76 of the Prisons Act (Cap 7:11). It is not necessary to specify one particular offence where the general condition of suspension is that the accused should not commit any offence involving dishonesty. If he committed any offence of dishonesty, whether it be theft of stock or any other, he lays himself open to the suspended sentence being invoked.

CRB N 486/03

In sentencing the accused, the magistrate said -
"In assessing the appropriate sentence the court took into consideration what accused said in mitigation. He is a first offender, who showed contrition and pleaded guilty to the offence. He did not waste the court's time. He did not benefit from the offence.

The aggravating features are that he committed a very serious offence. The penalties for stock theft are severe and harsh, reflecting the seriousness of the offence. Accused pre-planned and carefully and successfully executed his criminal designs. It was by sheer luck that the two beasts he had stolen were recovered before he found a buyer. It shows that accused is very dishonest and his moral blameworthiness is equally high. Having considered community service, I feel that accused is not a suitable candidate especially in view of the circumstances in which the offence was committed. A hefty fine coupled with a suspended prison term will meet the justice of the case".

The facts admitted by the accused are that on 14 March 2003 at about 3.am he and his co-accused (still at large) proceeded to the complainant's cattle pen and drove away two oxen from there. They drove the animals to a butchery at Mubaira Shopping Centre, Mhondoro, with the intention to sell them. The accused was arrested before the oxen were sold. The value of the oxen was \$200,000.

Zimbabwe is in agricultural economy to a very large extent.

The Legislature has enacted the Stock Theft Act (Cap 9:18) and has imposed penalties for stock theft which reflect the seriousness with which it views that offence. EBRAHIM J (as he then was) in *S v Maphosa* 1985(1) ZLR 184 (HC) said the following in this regard:-

"The seriousness with which the Legislature regards all instances of stock theft is apparent from the penalties it has specified. An ordinary magistrate has jurisdiction to imprison a person convicted by him for the theft of stock to a maximum term of four years (a period four times greater than which the magistrate ordinarily has in terms of his ordinary jurisdiction under the Magistrates Court Act). Indicative of the Legislature's attitude, too, is the very wide ranging criminalisation of conduct relating to or connected with the incidence of stock theft. (See ss 5 and 6). The offence of entering into land with intent to steal which is created by s.6 carries a maximum penalty of \$1 000 or imprisonment for one year or both such fine and imprisonment.

The courts have not been hesitant in reflecting this opprobrium to stock theft in sentences they have imposed in the cases which have come before them".

CRB N 486/03

The learned judge then went on to show how the courts have dealt with offences of stock theft in regard to sentence. He shows that except for very minor offences of theft of stock involving a small number of chickens or the contravention of s 4 of the Stock Theft Act, the courts have invariably imposed custodial sentences. See the cases referred to by the learned judge : *S v Sisiba* HH 288/93; *S v Mashayamombe* HB 74/82; *S v Ncube* HB 15/82; *S v Dick* GS 215/80' *S v Musiimango* GB 40/80 and *S v Chimombe* GS 219/80.

A case of more recent vintage is *S v Dube* 2000 (1) ZLR 386 (H) in which DEVITTIE J examined a number of decided cases on the theft of stock - *S v Matimbe & Ors* HH 251/92; *S v Munyombwe* S-21/93; *S v Muzutu* HH 58/88; and *S v Mhike* S-27/94. DEVITTIE J approved of the approach taken in *Matimbe (supra)* where SMITH J said :

"In cases of stock theft, where one or two head are involved, I consider that unless there are special mitigating factors, a sentence of not less than three years' imprisonment should be imposed with six or more months suspended for good conduct and a further period suspended on condition that the accused paid compensation to the complainant. Where the value of the cattle is high or there are two counts, as in *S v Nyenkwe* above, a greater sentence should be imposed".

DEVITTIE J then proposed a structured approach to sentencing in cases of Stock theft. His views are summarised in the headnote in *Dube* above, which reads:-

"Stock theft is generally regarded as a very serious offence, for which superior courts have laid down guidelines in respect of sentence. Where guidelines are given as to the sort of sentence that should be imposed in respect of a particular crime, the lower courts should eschew a rigid tariff approach where the facts of the individual case play no role and the reasoning is stunted by the numbers game. The courts should not neglect the truism that the appropriate level of sentence depends on the facts of each individual case. They should not treat the guidelines as immutable standards. The approach should be in three phases : (a) to identify the normal range of sentence for the offence; (b) having located the normal range of sentences, to place the particular offence at the appropriate level within that range; (c) to reduce the sentence by having

CRB N 486/03

regard to the mitigatory factors, such as youthfulness, the reasons for the commission of the offence and the consequences of the conviction. A plea of guilty should also attract a discount on policy grounds quite unrelated to contrition".

Applying this approach to the case which he was reviewing, DEVITTIE J reduced the sentence from four years with ten months suspended to twenty one months of which six months were conditionally suspended. The mitigating factors in that case were quite strong. The accused was a herdsman. He had not been paid his paltry wages of \$300 per month for two months. He was desperately in need of money as his wife was in hospital. He had stolen two head of cattle and he pleaded guilty to the charge.

The mitigatory factors in the present case are not as strong as those in *Dube's* case above. From what the magistrate said in passing sentence the accused's moral blameworthiness was quite high. He planned to steal and successfully executed his plan. The recovery of the cattle was fortuitous. He should have been given a much higher sentence than in *Dube's* case above even on the approach recommended by DEVITTIE J in *Dube's* case.

In my view by imposing a fine of \$80 000 for the theft of two head of cattle the magistrate not only departed, without adequate justification, from the guidelines given by the superior courts, but he also imposed a sentence which is without precedent in cases of theft of stock except very minor of them. In my view the magistrate misdirected himself on sentence. Stock theft cases of a serious kind such as the one under consideration should not be trivialised by imposing unduly lenient sentences. The cases I have cited are commended to the magistrate for his consideration.

Accordingly I withhold my certificate as I am unable to certify that the proceedings are in accordance with real and substantial justice.

MUNGWIRA J, agrees.....