

IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

In the matter between

COLLIN BOKA
versus
THE STATE

APPELLANT
RESPONDENT

OMERJEE J/ HLATSHWAYO J
21 October 2010

Criminal Appeal

Mr *Mushangwe*, for appellant
Mr *Masamha*, for respondent

OMERJEE J: The appellant in this matter was arraigned before the Magistrates Court Marondera on 9 counts of stock theft as defined in s 114(2)(a) of the Criminal Law Codification and Reform) Act [*Cap* 9:23]. To these charges he duly pleaded guilty. He was represented during the course of his trial by a legal practitioner. He was convicted as charged and was sentenced on 4 March 2010 as follows:-

Counts 1,2,3,7 and 8 were taken as one for purposes of sentence. He was sentenced to undergo twenty-five years imprisonment of which ten years were suspended on the usual conditions of good behaviour. Courts 4,5 and 6 were taken as one for purposes of sentence. He was sentenced to undergo twenty-five years imprisonment of which ten years were suspended on the usual conditions of future good conduct. For count 9 appellant was sentenced to undergo 15 years imprisonment. The total effective sentenced was therefore 45 years imprisonment.

Aggrieved by the severity of the sentence imposed by the trial court, the appellant noted an appeal against sentence only.

It was established by the State that the appellant had stolen a total of 44 head of cattle belonging to Shungu Sekeramai of Ulva farm, Marondera. The appellant at the time resided at March farm, in Marondera. The said bovines were then sold by the appellant to one Irene Makamba of Blueridge Farm. The beasts were slaughtered and the meat was sold to members of the public.

The appellant, in the commission of this offence was assisted by 3 other persons including a police officer. Their trials are still pending before the Magistrates Court. The State conceded that all 44 bovines were stolen on one occasion, but were sold and delivered to Blue ridge farm on different dates. Be that as it may, it is clear from the evidence on record that in effect what occurred, was a continuing criminal enterprise as between May to October of 2009, involving the theft of 44 bovines.

That technical splitting of charges by the trial court does not vitiate the proceedings. It is accepted that this court in order to minimise prejudice to the appellant, can use the device of treating all counts as one for the purposes of sentence. In *S v Sawyer* 199(2) ZLR 390(H) at 393 C it was stated as follows:-

“On the other hand, where the different counts are all closely related to one another in some way, then it is not only permissible, but often preferable, to treat separate counts collectively for sentence. For instance, where different offences are committed together as part of the same criminal activity, or where identical or similar offences are committed individually over a period of time but as part of an ongoing cause of conduct or collective sentence will generally be appropriate”.

This court takes the view that it is both desirable and appropriate, in the particular circumstances of this case to impose a globular sentence involving all 9 counts of theft. The appellant urges this court to find that “special circumstances” exist in this case so as to enable this court to impose in its discretion, a sentence other than the minimum mandatory sentence required to be imposed by law. That submission is not supported by the evidence and does not find favour with this court. In particular, all factors presented by the appellant, whether considered individually or cumulatively, constitute factors of mitigation of general application and do not amount to “special circumstances” in this matter.

The effective total sentence imposed by the trial court was 45 years imprisonment. We consider such sentence to be so manifestly excessive as to induce a state of shock. A sentence of this magnitude exceeds the limitation of a sentence for theft of property as enunciated by the Supreme Court. That court has suggested that the outer limits of sentence in property theft cases not involving the use of violence is one of 25 years imprisonment. In determining an appropriate sentence in this matter the courts takes cognisance that the offence committed is a very serious offence.

The offence, it is clear was committed by an organised gang of cattle rustlers. They stole a large herd of beasts. They resorted to originating falsified documents to legitimise their possession of these beasts. The 44 head of cattle were sold for financial gain. They were

motivated by greed and avarice in the commission of this offence. The appellant it is clear from his own evidence is possessed of assets of value. He owns a shopping complex at Dangamvura in Mutare. He also owns a motor vehicle and 36 head of cattle. He is also a livestock farmer operating from March farm, in Marondera. These factors aggravate the seriousness of this offence.

This court also takes into account the mitigatory factors present in this case. The appellant is a family man of 34 years of age and is a first offender. He pleaded guilty and in so doing he exhibited a measure of contrition. He offered to restitute 34 beasts. Having said that, it is clear that the aggravating factors in this matter far outweigh the mitigatory factors. In arriving at an appropriate sentence the court takes judicial notice of the fact that Zimbabwe has undertaken a process of Land Reform and empowerment in the agricultural sector. Cattle rearing is an intergral part of the agricultural wealth of Zimbabwe. Also, cattle rearing on a commercial scale, is an intergral part of commercial agriculture in Zimbabwe.

The conduct of the appellant in stealing from his neighbour in the context of Land Reform is clearly behaviour that undermines the thrust of Land reform, in our country. It is conduct that requires to be depreciated for it was motivated by greed and avarice. This court having found that no "special circumstances" exists in this matter, is obliged to impose a minimum mandatory sentence of not less than 9 years and not more than 25 years imprisonment. This court hereby sets aside the sentence imposed by the trial court.

All counts will be treated as one for the purposes of sentence and a portion thereof will be suspended for 5 years on the usual conditions related to good behaviour, regard being had to the factors of mitigation including restitution in this matter.

It is ordered as follows:-

1. The sentence imposed by the trial court be and is hereby set aside.
2. All counts are treated as one for the purposes of sentence.
3. The appellant is sentenced to undergo 18 years imprisonment of which 5 years of imprisonment is wholly suspended for a period of 5 years on condition that the appellant does not within that period commit any offence involving dishonesty and for which upon conviction he is sentenced to imprisonment without the option of a fine.

HLATSHWAYO J: agrees _____

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Mushangwe & Company, appellant's legal practitioners
A.G's Office, respondent's legal practitioners