

STATE
versus
RAJABU CHITUKULA
and
TAPFUMA DUBE
nd
TAFADZWA MUDEDE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 30 March 2012

Review Judgment

MATHONSI J: The accused persons were convicted of stock theft in contravention of s 114 of the Criminal Law Code [*Cap 9:03*] by the magistrates court sitting at Chinhoyi. The first accused person having been convicted in terms of s 114 (2) (d) was sentenced in terms of para (f) of subs (2) of s 114 to a fine of \$400.00 or in default of payment, 4 months imprisonment. In addition he was given a wholly suspended prison term of 10 months.

In respect of second, third and fourth accused, the trial magistrate was unable to find any special circumstances as would entitle them to a penalty other than the mandatory 9 years imprisonment provided for in para (e) of subs (2) of s 114. They were each sentenced to 14 years imprisonment of which 2 years imprisonment was suspended for 5 years on condition of good behaviour. A further 1 year imprisonment was suspended on condition they each compensate the complainant the sum of \$200.00 on or before 30 March 2012. This left the 3 accused persons with an effective sentence of 11 years.

The conviction of the accused persons was proper and nothing turns on it especially as the defence of second and third accused that they had found a snared Kudu and sold its meat was laughable to say the least against the background of the overwhelming evidence which was led on behalf of the state. Nothing also turns on the sentence of the first accused given that the trial magistrate was entitled to sentence him aforesaid. It is the sentence of second, third and fourth accused persons which presents some difficulty, is inappropriate and cannot be allowed to stand.

The state case against the accused persons is that on 29 October 2011 the complainant penned his 35 head of cattle at Tigere Village in Zvimba. The following morning he discovered that the cattle pen had been opened to allow the cattle out and they were scattered all over the place with 2 beasts having been tied with wire around their horns. 2 oxen were missing and when a search for them was conducted the complainant discovered a place where one black ox had been slaughtered. Its head and other parts were found at the scene but the bulk of the meat had been carried away. The second ox later returned home on its own.

Meanwhile the accused persons had been spotted in Chegutu selling meat in buckets leading to their arrest. The second, third and fourth accused persons led the police to the scene of the slaughter and readily admitted then to having committed the offence. They were to later renege in court. Substantial quantities of beef was recovered from them. The trial court accepted that the first accused had only received the stolen produce in the form of 2 buckets of beef and hence sentenced him in terms of s114 (2) (f) aforesaid.

In respect of second, third and fourth accused persons the trial court not only gave them a sentence which well above the minimum sentence of 9 years for the theft of 1 beast, but in his wisdom the magistrate also found it necessary to order compensation. I have thoroughly gone through the record of proceedings and nowhere is it recorded that either the public prosecutor or the complainant made an application for compensation. It follows therefore that the trial magistrate *mero motu* ordered compensation.

I am of the view that the trial magistrate fell into grave error not only in sentencing the 3 accused persons to a term in excess of the mandatory minimum sentence for 1 beast but also in ordering unsolicited compensation. While s 365 of the Criminal Procedural & Evidence Act [Cap 9:07] allows a court convicting a person of unlawfully taking another person's property to restore it or an equipment amount, that provision should be read in conjunction with s 368 (1) of that Act which reads:

“A court shall not make an award or order in terms of this part unless the injured party or the prosecutor acting on the instructions of the injured party applies for such an award or order.”

In *casu*, there was a signal failure by both Brian Chitanda the complainant or his father Simon Chitanda and indeed the prosecutor to apply for compensation. It was therefore incompetent for the trial magistrate to order it *mero motu*.

I had occasion in *S v Zulu* HB 174/11 (as yet unreported) at p 6 to make a pronouncement on sentence in stock theft cases which is more than the mandatory minimum sentence provided for in the Act. That case is almost on all fours with the present. I stated:

“Looking at the penal provision in s 114, it is clear that the legislature wanted to impose a deterrent penalty for what it regarded as a prevalent crime. The penalty provided for is severe enough without the court having to add on to it. Granted the sentencing court was a discretion to impose a sentence of up to 25 years but there is nothing to suggest that the legislature intended to accord the court the power to suspend part of that sentence where no special circumstances exist. In any event, it is part of our sentencing principles that where a court considers suspending part of a sentence subject to conditions, it must make it possible for the affected person to fulfil the condition *S v Mukura and Ors* 2003 (2) ZLR 596 at 599H – 600A. A person already serving a minimum sentence of 9 years would have no motivation to renege even if the court was entitled to suspend part of the sentence. The appellant stole a single beast. He was treated as, a first offender. In my view the mandatory sentence of 9 years met the justice of the case.”

I still stand by that pronouncement which applies fully to the case at hand. The three accused persons should have been sentenced to 9 years imprisonment as there is nothing whatsoever in the reasons for sentence given by the magistrate to justify the imposition of more than 9 years.

In the result, I order that:

1. The conviction of the first, second, third and fourth accused persons is confirmed.
2. The sentence imposed on the first accused is confirmed.
3. The sentence imposed on the second, third and fourth accused persons is set aside and in its place is substituted the sentence of 9 years imprisonment for each accused person.

MTSHIYA J, agrees.....