THE STATE
versus
ELSON MUTAMBU

HIGH COURT OF ZIMBABWE
MUSAKWA & CHATUKUTA JJ
HARARE, 21 May 2018

Chamber Application

MUSAKWA J: In the course of considering the accused's application for condonation of late noting of appeal it became apparent that the matter qualifies for review notwithstanding the relief that was being sought. The matter got compounded by the fact that the accused is a self-actor and he was out of his depth in respect of procedure.

This matter has a chequered history. In CON 248/13 the accused person was granted condonation of late noting of appeal. This was on 9 January 2014. The applicant was then represented by Mavhunga & Sigauke Legal Practitioners. It appears the appeal was never noted.

In the present application the accused again seeks condonation of late noting of appeal. This time the accused was a self-actor, presumably having been abandoned by his legal practitioners. Having noted the enormity of the sentence that was imposed against the accused person it was necessary that the original record of proceedings be availed. Such a simple task was not complied with from August 2017 until April 2018.

Although adorned with the 'review case cover' it is apparent that the proceedings in question were never subjected to automatic review. Despite the fact that the record cover bears the Registrar's stamp dated 19 August 2013 the proceedings appear not to have been placed before a judge.

The accused person who was jointly charged with three others pleaded guilty to two counts of stock theft. The offences took place in Mahusekwa. According to the facts, on 13 February 2013 the accused and others connived to steal cattle. Thus they proceeded to Pindura village where the complainants resided. The accused person apparently hailed from the same village although he now resided in Chitungwiza. During the night of 13 February 2013 the accused and company stole a black ox from the first complainant's pen. They drove it to a secluded place where they slaughtered it. They replicated the same *modus* in respect of

the second count save that they stole one black ox and one brown ox. Having butchered the cattle they loaded the meat onto their vehicle and took it to Harare where they disposed of it. The three cattle were valued at US$1 800.

The trial court found no special circumstances in favour of the accused person and imposed a globular sentence of 27 years' imprisonment. Of this sentence 3 years were suspended for 5 years on condition of good behaviour.

It is apparent that the trial court exceeded its sentencing jurisdiction. Section 114 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] provides that:

> "Any person who−
> (*a*) takes livestock or its produce−
> (i) knowing that another person is entitled to own, possess or control the livestock or its produce or
> realising that there is a real risk or possibility that another person may be so entitled; and
> (ii) intending to deprive the other person permanently of his or her ownership, possession or control,
> or realising that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control;
> or
> (*b*) takes possession of stolen livestock or its produce−
> (i) knowing that it has been stolen; or
> (ii) realising that there is a real risk or possibility that it has been stolen;
> or
> (*c*) is found in possession of, or has been in possession of, livestock or its produce in circumstances which give rise, either at the time of the possession or at any time thereafter, to a reasonable suspicion that at the time of such possession the livestock or its produce was stolen, and who is unable at any time to give a satisfactory explanation of his or her possession; or
> (*d*) acquires or receives into his or her possession from any other person any stolen livestock or produce without reasonable cause (the proof whereof lies on him or her) for believing at the time of acquiring or receiving such livestock or produce that it was the property of the person from whom he or she acquired or received it or that such person was duly authorised by the owner thereof to deal with it or dispose of it;
> shall be guilty of stock theft and liable−
> (*e*) if the stock theft involved any bovine or equine animal stolen in the circumstances described in paragraph
> (*a*) or (*b*), and there are no special circumstances in the particular case as provided in subsection (3), to imprisonment for a period of not less than nine years or more than twenty-five years; or
> (*f*) if the stock theft was committed in the circumstances described in paragraph (*a*) or (*b*) but did not involve any bovine or equine animal, or was committed in the circumstances described in paragraph (*c*) or
> (*d*)−
> (i) to a fine not exceeding level fourteen or twice the value of the stolen property, whichever is the greater; or
> (ii) to imprisonment for a period not exceeding twenty-five years;
> or both."

It is plainly clear from a reading of the above provision that the minimum mandatory punishment for theft of a bovine or equine animal in the absence of special circumstances is

nine years' imprisonment and the maximum punishment is twenty five years. The matter is not ameliorated by the purported suspension of a portion of the sentence.

The second issue is whether it is proper to pass a globular sentence in a case involving multiple counts of stock theft. As a general rule a globular sentence for multiple counts should only be imposed in exceptional cases where the offences are of a similar nature and are closely linked in time. In this respect see S v *Chawasarira* 1991 (1) ZLR 66 (H). In *S* v *Chirai* 1992 it was held that there are many reasons why separate punishments should be imposed for separate offences. In *S* v *Huni and Others* 2009 (2) ZLR 432 (H) KUDYA J in a review judgment in similar matters of stock theft held that it is improper to pass a globular sentence in respect of multiple counts of stock theft as this defeats the purpose of s 114 (4) of the Code which provides for a minimum mandatory imprisonment term of nine years in the absence of special circumstances. The learned judge referred to the decision in *S* v *Tarwirei* GS-350-81.

In my respectful view it is not proper to treat the two counts in the present matter as one. Although they were committed in the same village, the complainants are different. In addition, the second count should attract a more severe penalty because of a higher number of cattle involved. As is the practice in multiple counts, where the overall sentence becomes excessive the court can consider suspending a portion or order part of the sentence or the whole of it to run concurrently with the sentence in the other count. Section 114 (4) of the Code permits the suspension of the whole or a portion of a sentence that is in excess of nine years. The provision reads as follows:

> "A court sentencing a person under paragraph (*e*) of subsection (2)−
> (*a*) to the minimum sentence of imprisonment of nine years, shall not order that the operation of the whole or any part of the sentence be suspended;
> (*b*) to imprisonment in excess of the minimum sentence of imprisonment of nine years, may order that the operation of the whole or any part of the sentence exceeding nine years be suspended."

As was the approach in *S* v *Huni and Others supra* the whole of the sentence in the first count will be ordered to run concurrently with the sentence in the second count. This is because of the interconnectedness of the two counts.

In the result, the sentence that was imposed is set aside and in its place is substituted the following-

Count 1

"Nine years' imprisonment.

Count 2

Ten years' imprisonment.

The whole of the sentence in the first count is ordered to run concurrently with the sentence in count 2."

The trial court is directed to recall the accused person and explain the reduction in sentence.

CHATUKUTA J, agrees…….