THE STATE
versus
FREDDY TOGAREPI

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 22 February 2017

Criminal Review

MAFUSIRE J: Minimum mandatory sentences for certain crimes like stock theft are a fact of life. Sometimes they do work against common sense because in the real world there is nothing like a one-size-fits all approach to sentencing. By their very nature, mandatory sentences purposefully take away the inherent discretion of the law courts to assess such penalties as may be appropriate in any given situation.

Where a person is convicted of stock theft in contravention of s 114 of the Criminal Law [Codification and Reform] Act, [*Cap 9: 23*], and there are no special circumstances, the court has no choice but to impose nothing less than the minimum mandatory penalty of nine years' imprisonment. There is no discretion in this, except to go up, in appropriate circumstances, but not down. However, in the absence of any justification for going up, it is the mandatory minimum sentence that the court must impose.

In *S v Chitate*[1] MAWADZE J and I decried the harsher sentence of twelve years imprisonment that the trial court had imposed for theft of a single bovine by a sixty-two year old first offender in circumstances where there had been no justification for going above the mandatory minimum. On p 1 – 2 of that judgment we said:

> "For stock theft, the Code prescribes a mandatory prison term of not less than 9 years.
> Where the essential elements of the crime have been proved and there are no special circumstances, the courts have no choice but to impose the prescribed minimum. Undoubtedly, the court may go above the prescribed minimum. But by all accounts 9 years is already a very long stretch. The court's discretion to impose a sentence other than the prescribed minimum has to be exercised judiciously, not whimsically. The sentence should not be a thumb-suck."

We reduced the sentence to the mandatory minimum.

[1] HH 568 -16

In casu, the trial court seems to have made the same error. The accused, twenty three years old at the time, stole the complainant's bull. Nothing was recovered. The bull had been slaughtered. The carcass had decomposed. The accused pleaded guilty. There were no special circumstances. The trial court sentenced him to thirteen years imprisonment of which two years imprisonment was suspended for five years on condition of good behaviour. A further one year imprisonment was suspended on condition of restitution. The effective sentence was ten years imprisonment.

The conviction was proper. It is hereby confirmed. But the sentence was not.

In *Chitate*, we noted that the factors that the trial court had taken into account in going above the mandatory minimum were neither cogent nor borne out by the record. It said stock theft had been on the increase in that part of the country; that the crime had been premeditated; that the accused had stolen out of greed, not need, and that it was necessary to impose a deterrent sentence.

In casu, the trial court seems also to have made the same mistake again. In apparent justification for imposing a sentence that was a whopping four years above the mandatory minimum, it said, among other things, that the beast was never recovered; that the accused had benefited from the offence; that the crime had been committed out of greed, not need; that there was need for restitution; and that therefore a thirteen year prison sentence would meet the justice of the case. That approach was wrong.

In *Chitate* we said even accepting that the evidence that the court had taken into account in assessing its sentence had been there, still it did not explain why it went above the prescribed minimum. But in fact, the factors there, as in the present case, merely explained aggravating circumstances. At p 2 of the judgment, we said:

> "Where there is a prescribed minimum sentence for an offence, it is improper for the court to impose a harsher penalty above the prescribed minimum in circumstances where such a sentence is not warranted, simply to create some room to suspend a portion, for whatever purpose, for example, restitution. If in its discretion the appropriate sentence is the prescribed minimum, the court should stick to it. That it cannot suspend the operation of a portion on condition of restitution does not necessarily leave the complainant without a remedy. Through the prosecutor, the injured person can always apply for restitution or compensation in terms of Part XIX of the Criminal Procedure and Evidence Act. Unlike the award of restitution or compensation under s 358[2] of that Act, the award of compensation or restitution under Part XIX is not part of the sentencing formula: see *S* v *Mutetwa*[2]."

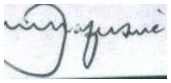
[2] HH374/15

In casu, there was no justification for the trial court to impose a sentence above the prescribed minimum. As such, the sentence was not in accordance with real and substantial justice. Therefore, it is hereby set aside and substituted with the following:

"**The accused is sentenced to 9 years imprisonment.**"

The court *a quo* is hereby directed to recall the accused and to pronounce to him the above altered sentence.

22 February 2017



Hon Mafusire J

Hon Mawadze J I agree _____