

MEHLULI DUBE
And
ABEL MPOFU
versus
The State

HIGH COURT OF ZIMBABWE
MAWADZE J AND ZISENGWE J
MASVINGO, 24 June 2020, 23 September 2020, 30 September 2020 & 10 March 2021

Criminal Appeal

Mr C Ndlovu, for both appellants
Mr E Mbavarira, for the respondent

ZISENGWE J: The appellants were convicted in the Magistrates court sitting at Masvingo of seven counts of stock theft. Although upon arraignment they denied each of those seven counts, the court *a quo* found in the wake of the ensuing trial that they had acted in common purpose on seven separate occasions to steal a total of fifty-three head of cattle and convicted them accordingly. Consequent upon such conviction, they were each sentenced to 9 years' imprisonment in respect of each of the seven counts. Thirty of the cumulative sixty-three years' imprisonment were suspended for 5 years on the usual conditions. Aggrieved by the conviction and disgruntled about the severity of the sentence they appealed against both to this court.

It is necessary point right from the outset that the state in its heads of argument filed in response to the appeal and for the reasons articulated later in this judgment, conceded to the appeal (in respect of both conviction and sentence). Our perusal of the record of proceedings of

the court below, however, was such as to compel us (that concession notwithstanding) to invite detailed submissions from the parties it being trite that such concession is not necessarily binding on the court. Pursuant thereto the parties did proceed to make substantive oral arguments in support of their common position.

The allegations

The matter originated from the two neighbouring districts of Mwenezi and Chiredzi of Masvingo province. The allegations were that in the four months' period stretching from January to April 2014 and on seven separate occasions and at different locations within Mwenezi district, the two appellants stole the said beasts. It was further alleged that they thereafter ferried the said livestock in hired trucks to the lowveld town of Chiredzi where they disposed of them by selling the bulk of them to two commercial meat processing entities namely Montana meats and Koala meats and the rest to private individuals.

The defence

The appellants' position throughout the trial was a flat denial of any involvement in either the theft of the cattle or in their subsequent disposal. Further it is apparent from a perusal of the record of proceedings in the court *quo* that the position of the appellants (although they did not say so in as many words) was that they were unfortunate victims of evil machinations orchestrated by the 1st state witness Sifakanye Sibanda ("Sifakanye"). In their view Sifakanye must have been the chief culprit in the theft of the beasts working in cahoots with some members of the police force.

It is pertinent to note that at the commencement of the trial the appellant submitted a statement containing admissions of fact in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] ('the CPEA') wherein they admitted the loss by the complainants of their cattle and the subsequent recovery of some of those beasts from different places in Chiredzi. The significance of these admissions will soon become apparent in this judgement.

The evidence

In the trial that followed, nine witnesses testified for the state and each of the two appellants were the only witnesses for the defence. From the evidence as a whole one finds that it is common cause that a total 53 beasts were stolen from seven complainants (17 in count 1, 5 in count 2, 13 in count 3, 4 in count 4, 1 in count 5, 6 in count 6 and 7 in count 7). Equally

undisputed is the fact that following police investigations some of those beasts were recovered from Koala meats and Montana meats. Some were recovered from Sifakanye, and some from one Benson Chirambamuriwo and yet others from persons who had received them from the said Benson Chirambamuriwo. None of the stolen beasts were however recovered from the two appellants.

The all-important question confronting the court *a quo* was whether the state had managed to establish beyond reasonable doubt that the stolen beasts which had been subsequently recovered could be traced back to the appellants warranting an inference that it was them who had in fact stolen them.

What follows is a synopsis of the evidence led from the witnesses during the trial not necessarily in the order they testified but rather in a manner that facilitates an easier appreciation of the chronology of events.

Sifakanye Sibanda

This witness occupies central role in this case not least because of his involvement in some of the key events which culminated in the arrest and subsequent arraignment of the appellants. It was evidently because of such involvement that the state conceded to this appeal. This was ostensibly on the premise of the possibility of him having fabricated evidence to evade prosecution himself.

Be that as it may, this witness is a former police officer and was at the material time employed by Montana meats as a cattle buyer and grader. He also ran a transport business wherein he would, among other things ferry cattle from one place to another for a fee. It was in this latter capacity that he testified to have been contracted by the appellants on numerous occasions to ferry cattle (through his designated driver) from Mwenezi to Chiredzi. Significantly, it was his evidence that the cattle which he transported at appellants' behest ended up being sold at Montana meats save for one incident where some of the cattle were rejected by Montana. In the wake of such rejection, he would in his personal capacity proceed to purchase four steers at an open "auction" conducted by the appellants at the Chiredzi show grounds. He also indicated that some were purchased by one Benson Chirambamuriwo and the rest were later sold to Koala meats. It soon became apparent that what he referred to as an "auction" was nothing more than a private sale to any interested member of the public present at that event who might have made an

acceptable offer. It was his evidence that he proceeded to sell the four steers he purchased from the appellants to Koala meats after they had been duly cleared by the police.

He also recounted another occasion where he claimed to have been contracted by the appellants to similarly transport cattle from Mwenezi to Chiredzi, the payment of such service coming as it did in the form a steer in lieu of cash.

Ultimately however, both the four steers he had purchased at the “auction” and the one steer he had received as payment for his transportation services turned out to be stolen as they were subsequently positively identified by the true owners in the course of police investigations.

He would deny suggestions put to him in cross examination that he had taken advantage of appellants’ part dealings with Montana meats to use their pre-existing particulars to record the disputed transactions.

He would concede during cross examination that he did not see the cattle movement permits used to transporting cattle from Mwenezi to Chiredzi. He would further concede to the apparent absence of the clearance permit in respect of the steer he received from the appellant as payment for transporting livestock. He attributed the lapse to what he termed “trust” implying that that step was overlooked or dispensed with on the faith that the transaction was above board.

He categorically denied assertions put to him during cross examination suggesting that he is the one who stole and sold the beasts in question but had proceeded to fabricate evidence to falsely implicate the appellants.

Lenos Chiminya

This witness was employed by Sifakanye as a driver. The long and short of his evidence was that on two occasions he was assigned by his employer to ferry cattle on behalf of the two appellants from the Rutenga area of Mwenezi district to Chiredzi. According to him on both occasions he communicated and subsequently met up with both appellants at the designated place where the cattle were loaded onto the vehicle with the aid of a loading ramp. He surmised that the appellants obtained his phone number from his employer. On the first occasion the loading took place at around 3 am and the cattle in question numbered either 11 or 12 (he was not certain) and he ferried the beasts to Montana meats.

It was his evidence that on the second occasion the loading took place at around 4am and that he had similarly transported the beasts numbering either 12 or 13 to Chiredzi. However, the

cattle which were initially destined Montana meats were subsequently taken to Koala meats at the behest of Sifakanye after a disagreement ensued with the former.

He indicated that on both occasions there was corresponding documentation authorising the movement of the cattle. He would explain under cross examination that his role was merely that of driver that all other procedures were done by his employer and all documentation remained in his employer's possession.

Brighton Sibanda and Cosmas Mushayi

These two testified as the 6th and 7th state witnesses respectively. They were both employed by Montana meats at the material time, the former as a secretary whose responsibilities included the issuance of invoices in instances where Montana meats purchased cattle. The latter on the other hand was a cashier whose primary duty was to pay out to any seller the proceeds of any sale.

Their accounts as with duties were related and complementary. The net effect of their evidence was that the two appellants did deliver to Montana meats the head of cattle recorded on exhibit 5 (which consists of some six pages of the company's "cattle buyers' invoices"). Whereas it was Brighton Sibanda (who incidentally happens to be Sifakanye's nephew) who issued the invoices to the 1st appellant, it was Cosmas Mushayi who would subsequently pay out the purchase prices of the cattle.

They both indicated that on those occasions both appellants were present when the delivery and sale of the cattle took place. Brighton indicated that whereas it was the 1st appellant who participated in the price negotiations for the sale of the cattle, the 2nd appellant was at all times present and communicated with 1st appellant during those negotiations. Of particular importance is the fact that upon receipt of the cattle which had been purchased, these cattle would then have a set of ear tags attached to them and the numbers inscribed thereon would be entered on the cattle buyer's invoice.

Significantly, it was Brighton's evidence that the 1st appellant's details were recorded on the cattle buyers' invoice and he (i.e. 1st appellant) appended his signature thereon as confirmation of these transactions.

Cosmas' evidence was to the effect that he paid the appellant in terms of the information recorded by Brighton (and signed for by 1st appellant) on the cattle buyer's invoice. They both denied suggestions put to them in cross examination that the invoices in question were forged and that the appellants did not sell to Montana meats the livestock recorded on those invoices.

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Benson Chirambamuriwo

He testified as the 5th state witness and his evidence was to the effect that he purchased five head of cattle from the appellants on two different occasions. He indicated that on the first occasion he purchased three beasts at an open place near the Chiredzi show grounds. He explained that this followed a phone call he received from Sifakanye advising him of sale being conducted. He indicated that on the second occasion he purchased two head of cattle from the 2nd appellant. It was also his evidence that in the intervening period the five cattle were kept on his behalf by Montana meats. When he subsequently took possession of them, he slaughtered one beast and swapped the 4 heifers for some oxen with certain members of the community from whom they were later recovered. He would reiterate under cross examination that his dealings were with the 2nd appellant and it was to whom that he had paid the purchase price.

He would concede under cross examination that he did not sign for the receipt of the purchase price from the 2nd appellant but explained that he assumed that this had since been done by Montana meats and that he based this entire transaction on trust particularly on Sifakanye who was then an employee of Montana meats. He indicated that there was no stock clearance documentation to accompany his purchase of these beasts as he thought that this had since been done by Montana meats. However, when he exchanged those beasts he did go through the normal police clearance procedures but as of the time of the trial he had since lost those papers.

Tobias Chinyama

He testified on the ninth and final state witness. He claimed to have been an independent by stander who observed the sale conducted by the two appellants in the proximity of the Chiredzi show grounds where he resided at the material time.

According to him that sale took place in the wake of the rejection by Montana meats of some of the cattle the two appellants had submitted for sale. It was during that open sale that he observed Sifakanye purchasing 4 steers.

Although there was some slight ambivalence on his part regarding the extent of his prior knowledge (hence identification) of the appellants, he would however maintain under cross examination that both appellants were present during that sale. He would deny that he was a "hired gun" who had been roped in by Sifakanye to mislead the court

Doubt Phiri

He is a police officer whose role was to clear 16 head of cattle which had originally been destined for Montana meats but had to be redirected to Koala meats owing to a price (or other) dispute between appellants and the former. According to him the cattle were cleared in the name of the 1st appellant with 2nd appellant appearing as a witness to the process clarifying as he did that in the absence of a village head any available witness sufficed. He indicated that he extracted the required information from a form 392 originating from Mwenezi. He would deny under cross examination that 1st appellant's personal details had been forged on the clearance certificate.

Jacobus Phillipous

At the material time he was the branch manager at Koala Park Chiredzi. Basically, his evidence was to the effect that based on the company's policy and records, (in this case exhibit 3 namely a live cattle sheet) which corresponds to exhibit 2 he paid 1st appellant for the delivery of 15 beasts. He was emphatic that payment could only be effected upon the physical production of the seller's identification details which needed to match the clearance certificates (in this case exhibit 2). Ultimately the seller was required to append his signature at the bottom of the receipt as confirmation of the receipt of payment. He confirmed that the documentation revealed that the cattle had earlier been cleared at Montana meats.

He would be questioned at length during cross examination on the misspelling of 1st appellant's first name on exhibit 3 which reads "Muthuli" instead of "Methluli". The argument here being that this was indicative of the witness not having had physical possession of the 1st

appellant's National identity card at the time of writing out the receipt of payment. The witness denied that assertion but indicated that one Chirambamuriwo who authored that document was best placed to answer the question of the misspelling.

Elifas Sibanda

He was the investigating officer of this case and testified as the 8th state witness. His evidence was crucial for the state in that it provided all the important nexus between the cattle recovered from various places via the Montana and Koala records to the appellants and ultimately to the complainants.

An overview of his evidence was to the effect that he recovered six beasts from Montana, four beasts from Koala, one beast from Sifakanye and three cattle from persons who had exchanged their beasts with Benson Chirambamuriwo. The latter is a butchery operator in Chiredzi. Central to the evidence is that the cattle which he recovered after they had been identified by their rightful owners had ear tags affixed to them. Those ear tags in turn led him to the corresponding cattle buyers' invoices at Montana (exhibit 5) which bore the name of the seller (i.e. the name of the person who had sold the beats to Montana).

With the cattle in question having been positively identified by the various complainants, the circle for him had, figuratively speaking, been completed. The parts of the jigsaw thus all fit in. In that way therefore, he was able to link the recovered beasts to each of the seven counts and it shall not be necessary to reproduce his evidence to that effect here.

It is also pertinent to note as indicated hereinbefore that over and above the evidence of the Investigating Officer the appellants made admissions of fact in terms of section 314 of the CPEA regarding the recovery of the beasts in respect of each of the seven counts. In this regard they admitted the following; that the complainant in count 1 lost seventeen head of cattle, four of which were recovered from Koala meats and from Montana meats. That the complainant in count 2 lost five head of cattle one of which was recovered from Sifakanye. That in count 3 the complainant Medicine Maranda lost thirteen head of cattle, four of which were recovered from Koala meats. In count 5 the admission by the appellants was that the complainant Jeniffer Chuma lost four head of cattle but subsequently recovered two of them at the Montana feed lots. Regarding count 5, the admission made was that the complainant Joshua Mboweni had lost a

single cow which was recovered at the Montana Triangle feed lot. That Kashitigo Madzudzo the complainant count 6 had lost six head of cattle two of which were recovered from Jephson Makuvu and Benson finally that the John Mhere the complainant count 7 had lost seven head of cattle two of which were recovered from Jephson Makuvu and Like Pasvani. All that the investigating officer did was to demonstrate through the invoices and receipts from Montana and Koala meats coupled with the evidence he received from the various witnesses that the cattle recovered were linked to the appellants.

The witness also observed *inter alia* that from the paperwork at his disposal (notably the Police livestock clearance certificate and a cattle buyer's invoices) he was able to piece together that the cattle which Sifakanye sold to Koala had in fact originated from the appellants. Of particular relevance was his observation that a single beast has been cleared by the police in Mwenezi at the behest of the 1st appellant. This was on the Police livestock clearance certificate with serial number 1226609 (exhibit 6). He however observed that the subsequent "re-clearance" supposedly based on it (i.e. exhibit 6) revealed that sixteen beasts has been "re-cleared". This was on exhibit 2 with serial number 1226293. In his account he explained "re-clearance" to mean a second clearance of beasts which had earlier been cleared to a subsequent purchaser or recipient. In this regard the serial number of the first clearance certificate would be endorsed on the face of that second or subsequent clearance certificate.

The clearance of sixteen cattle based on a certificate wherein one beast was originally cleared according to him meant that the appellants tampered with the entries on the clearance certificates to reflect sixteen head of cattle instead of a single beast. Further he observed that although sixteen beasts were cleared on exhibit 2 payment was made for five head of cattle.

He denied harbouring any malice towards the appellants or exhibiting bias towards Sifakanye pointing out as he did under cross examination that independent witnesses basically confirmed what he had unearthed through his investigations.

Part of the cross examination of this witness consisted of impugning the correctness of identification of the beasts by the complainants. However, in the view of the formal admissions of fact made by the appellants, that course of action was untenable. The net effect of making formal admissions of fact is to dispense with the need to adduce evidence of the facts so admitted. Section 314 (1) provides as follows

“314 Admission of fact

1. *In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact. (Emphasis added).*

The rationale behind making formal admissions is to reduce the scope or breadth of contestation in a criminal trial. It is one of the tools aimed at the curtailment proceedings. A formal admission is therefore generally regarded as binding on the maker. A party who would have ordinarily borne the duty to prove that a particular fact is relieved of the need to do so. In *S v Makhado* 1999 (1) ZLR 467 (H) GILLESPIE J had the following to say regarding formal admissions of fact;

“The admissions sought and obtained from the accused are formal admissions as opposed to informal ones. That is to say, they are admissions of fact made in response to formal requests, as opposed to concessions contrary to his interest made by the accused in the course of his evidence. The former, once made, constitute proven fact concerning which no evidence need be led.” (emphasis added)

See also *S v Dhliwayo* 1987 (1) ZLR 1 (H) *S v Mandwe* 1993 (2) ZLR 233 (S).

The appellants having thus made formal admissions regarding the loss of the cattle incurred by the seven complainants and the recovery (implying a positive identification) of some of those beasts, it was inappropriate therefore for counsel to embark on an extended mission in cross examination to question the veracity of the identification of those beasts by the complaints.

Moving on, the witness was further quizzed on various aspects of his testimony particularly as same relates to the thread of evidence supposedly tying each count to the accused persons. It shall not be relevant however to regurgitate the exchange here, suffice it to say that the witness maintained that from the documentary evidence at his disposal and from the information supplied by the various state witnesses he was able to conclude that it was the appellants who had stolen and sold the cattle in question.

The appellants in their respective accounts maintained their stance they had absolutely nothing to do with the stolen cattle. They indicated that they were in the cattle business wherein they would purchase cattle for resale. They admitted that on various occasions they would hire

Sifakanye's trucks to transport cattle from Mwenezi to Chiredzi but completely denied having transported the cattle that form the subject matter of the seven counts of stock theft.

They dissociated themselves from the clearance certificates which the state indicated were generated at their instance. They further questioned a few aspects regarding the authenticity and regularity of the clearance certificates particularly the fact that the description of the cattle on exhibit 2 featured at the back of the certificate which to them was highly irregular.

They disowned the signatures on the cattle buyer's invoices. They denied having hired Sifakanye's truck to ferry the beasts in question from Mwenezi to Chiredzi. They denied any involvement in the clearance of the cattle by the police either at Mwenezi or Chiredzi. Needless to say they denied having sold those cattle to Montana, Koala Sifakanye or Benson. In a word therefore, they denied the evidence of all the state witnesses in its entirety.

At the conclusion of the trial however, the court *a quo* being satisfied that the state had managed to prove its case against each of the appellants beyond reasonable doubt convicted them accordingly before sentencing them as earlier stated.

The grounds of appeal against conviction were couched in the following terms: -

GROUND OF APPEAL AGAINST CONVICTION

1. The trial court erred in convicting the appellants in view of the following factors: -
 - (i) Nothing was recovered from the appellants
 - (ii) All the cattle were recovered from Montana and Koala meats
 - (iii) All the Montana meats employees had access to 1st appellants particulars since he had previously sold the cattle to them
 - (iv) All the persons who were found in possession of the stolen cattle were suspect witnesses and had interests to protect
 - (v) \the transporters were Sifakanye Sibanda's employees and the latter worked for Montana meats
 - (vi) The stock clearance forms and cattle movement permits used to transport the cattle from Mwenezi to Chiredzi were never produced
 - (vii) The state did not send the buyers invoice to a handwriting expert (document examiner) to prove that the 1st Appellant is the one who signed for the money.

The state should have compared signatures on the old invoices with the signature on the invoices in dispute

- (viii) Montana meats employees failed to explain why they accepted cattle which were in excess to the number stated in the stock clearance form
2. The trial court erred in finding the appellants guilty without finding that their evidence was false

As intimated earlier the state conceded to the appeal against conviction and set forth its reasons from doing so, most of which coincide with the appellants' grounds of appeal. Reference will be made to salient parts thereof as and when same are relevant for the resolution of any point in issue.

Although the defence itemised a total of nine separate factors in impugning the propriety of the conviction, it must be stated right from the onset that the evaluation of the evidence requires of the court to consider the evidence holistically instead of focusing too intently on discrete pieces of evidence. It has been said more than once that doubt may indeed arise when regard is had to a single piece of evidence when same is viewed in isolation, but such doubt may be set to rest when the evidence is considered holistically. The approach followed in *S v Chabalala 2003 (1) SACR 134 (SCA)* correctly sets out the manner in which evidence should be evaluated. Heher AJA (as he then was) at 139 (i) -140(b) said the following:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence taking proper account of inherent strengths and weakness, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt of the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch to one (apparently) obvious aspect without assessing it in the context of the full picture of the evidence".

In the same vein, it is important to bear in mind that what is required of the state is to prove its case only beyond reasonable doubt and not beyond a shadow of doubt. In this regard the following was said in *R v Mlambo 1957 (4) SA 727 (a) 727 and 738 A*.

"In my opinion, there is no obligation upon the crown to close every avenue of escape which may be said to be open to the accused. It is sufficient for the crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."

It is against the backdrop of the above principles that the grounds of appeal will be examined *vis-a-vis* the evidence led in the proceedings *aquo* and the Magistrate's reasons for judgement.

The recovery of the stolen cattle

Grounds of appeal 1 (i) (ii) and (iv) are inter-related, the nub of the argument being that the conviction cannot be allowed to stand given that none of the stolen beasts were recovered from either of the appellants but rather from third parties to whom they were sold.

In my view, however, this argument falters when placed in the overall context of the evidence led. It is farcical to suggest that a conviction of theft of property can only follow from instances where the alleged thief is found in possession of such stolen property. To begin with not infrequently movables are stolen (as did happen *in casu*) for purposes of sale elsewhere. A rigid approach positing that only the person in whose custody stolen items are found is by that very fact to be held accountable for the same can yield absurd results. In some instances, the person with whom the property is found may be able to provide a satisfactory explanation of such possession.

Indeed, it is not uncommon for stolen goods to change hands several times from the time of their appropriation to the time of their eventual recovery. Whether the conclusion that the persons from whom such goods are recovered did in fact steal them or that same can be traced back to someone else depends on the explanation provided and the surrounding circumstances. In the context of the case this is illustrated for instance, by the fact that the stolen cattle recovered from Jephison Makuva and Like Pasvani, both of which had received them from Benson Chirambamuriwo who in turn indicated that he purchased them from appellants. It would be ludicrous therefore to insist that Jephison Makuva and Like Pasvani should be held accountable for the theft because they were found in possession of the animals.

What is striking in the present matter, however, is that virtually all the persons or entities from whom the cattle were recovered pointed accusing fingers at the appellants. Montana meats

employees Brighton Sibanda, Cosmas Mushayi and Sifakanye himself all maintained that it was the appellants who sold the cattle to the enterprise. Similarly, Koala employee Jacobus Phillipous points at the 1st appellant (albeit indirectly) as having received the proceeds of the sale of the cattle which were subsequently found in the possession of Koala. He denied suggestions that money could have been paid out to someone else.

Benson Chirambamuriwo from whom some of the cattle were recovered and who himself exchanged some of the stolen cattle with other persons equally pointed his accusing finger at the appellants as the origin of the stolen bovine beasts.

Sifakanye on whom the appellants appear to heap all the blame and from whom some of the stolen cattle were recovered also pointed his accusing finger at the appellants as the persons from whom he received those beasts.

Against the backdrop of this evidence I find appellants' argument untenable wherein they urge the court to overturn the conviction ostensibly on the basis that the appellants were not found in possession of the stolen beasts.

The contention that Sifakanye's foot print supposedly pervades and thereby taints with suspicion the entire series of transactions evidently constitutes the bedrock of appellants' appeal. The argument being therefore that the court a quo erred in failing to treat him (i.e. Sifakanye) as a suspect witness and his evidence with due caution. Reliance was placed on the case of *S v Ngara* 1987 (1) ZLR 91 (SC). This begs the question whether or not Sifakanye should be viewed as either an accomplice or possibly one who actually committed the offences and framed the appellants.

In this context the word accomplice will be considered in its wider meaning other than a person who has participated or assisted in the commission of an offence. This is because at law the term may also refer to any person who has committed an offence *in connection with* the same criminal transaction which forms the subject-matter of the charge; it can also mean a person who *appears to know a good deal about the offence* and has some reason of his own to serve in giving evidence. The latter is clearly the context in which the appellants urge this court to assess the evidence of not only Sifakanye but that of all the state witnesses.

However, having considered the evidence as a whole, I find far-fetched the suggestion advanced in ground 1 (iv) that all the persons from whom the cattle were found, particularly

Koala meats and Montana meats must have doctored their respective records to protect Sifakanye and falsely implicate the appellants. The interplay of the discrete pieces of evidence is such as to render this a remote rather than a reasonable possibility. To accept such a position would imply accepting that Sifakanye somehow exerted such influence upon virtually all the state witnesses who in turn spinelessly buckled under the same. This argument is an extension appellant's position in the proceedings *a quo* that there appears to have been collusion between the witnesses under Sifakanye's influence to falsely implicate them.

The state also appeared to have bought into this narrative as they made the following remarks in conceding to the appeal.

"The evidence from witnesses leaves a lot to be desired. Sifakanye can rightly be viewed as a suspect witness whereby the court a quo needed to apply the cautionary rule. His influence throughout the transaction looms large and it is possible that he misled the court in order to run away from his illegal involvement as regards the cattle".

What this argument conveniently ignores is the cumulative effect and inter-relatedness of all the evidence presented before the court *a quo*.

It fails to explain for instance why the 9th state witness Tobias Chinyama who at the material time stayed close to the Chiredzi show grounds would crawl out of the woodwork, figuratively speaking, and invent evidence to the effect that he observed the appellants conducting an open sale at the Chiredzi show grounds. According to him it was at that sale he witnessed Sifakanye purchasing four steers.

As a matter of fact, Chinyama's evidence regarding the sale of the beasts at the show grounds is in tandem with that of both Benson Chirambamuriwo and Sifakanye. His evidence further complements (albeit indirectly) Sgt Doubt Phiri's account to the effect that he officiated in the clearance of some head of cattle which had originally been destined for Montana meats but owing to a dispute between the appellants and the meat processing company had to be redirected to Koala thereby necessitating such subsequent clearance.

In this regard Sifakanye's evidence rings true. I repeat here for emphasis that he testified that on one occasion the beasts that the appellants had brought to Montana were rejected due to some prevailing government policy. According to him the appellants reacted by selling the beasts at what he referred to as an "auction" on which occasion he purchased four steers with Benson purchasing some heifers and the rest being taken by the appellants to Koala.

Further, this argument fails to explain away the evidence of the investigating officer Elfias Sibanda who recovered exhibit 6 from the police records at Mwenezi and Rutenga showing that the 1st appellant had in fact sought and obtained the police clearance of one beast from Rutenga to Chiredzi on Police clearance with serial number 1226609.

I also find it absurd to suggest that Sifakanye having supposedly stolen the cattle and having laid out an impressive and elaborate scheme which designedly excluded him from the entire picture would inexplicably drop his guard and "pretend" to openly "purchase" some beasts he had supposedly stolen. It makes no sense. Contrary to the concession by the state in this regard, I believe there was no misdirection on the part of the court *a quo* in rejecting the invitation to treat with circumspection under the cautionary rule. There was no basis for the same. The mere fact that someone purchased stolen goods or unwillingly transacted with stolen goods does not *ipso facto* render them a suspect in the theft.

To put everything in perspective therefore, the tapestry woven by the evidence was such that the evidence by Sifakanye corroborates that of Benson Chinyama regarding the sale by appellants of beasts at the show grounds and their purchase by both Sifakanye himself and Benson. It also ties in with the evidence by Chinyama. Further his evidence that some of the beasts originally destined for Montana ended up being taken to Koala meats ties in with the evidence of Sgt Doubt Phiri who cleared the said beasts and that of Jacobus Phillpous who paid for the said beasts. His evidence that on certain occasions the appellants sold beasts to Montana is corroborated by that of Brighton Sibanda and Cosmas Mushayi and his driver Lenos Chinyama. Sifakanye's evidence that it was the appellants who cleared beasts in Mwenezi is confirmed in part through the clearance certificate originating and through the evidence of Brighton Sibanda who received the beasts at Montana.

The documentary evidence in the form of the cattle buyer's invoices lends support to the evidence of Brighton Sibanda and Mushayi regarding the appellants having sold the beasts in question to Montana.

One finds that the evidence of virtually every state witness corroborates and lends support to the rest. Chances of this being Sifakanye's handwork in setting up an elaborate scheme of deceit to camouflage his own wrong-doing are in my view virtually non-

existent. There is simply no evidence of such. Such an allegation against Sifakanye amounts to more than mere speculation and supposition.

In this appeal Tobias Chinyama was characterized as a "hopeless witness" ostensibly because when he was interviewed by the police he referred to the 1st appellant but in court he referred to the 2nd appellant. A witness cannot be condemned solely because of an apparent contradiction without assessing his evidence in context and holistically. In *S v Oosthuizen 1982 (2) SA 571 (T) at 576 G-H Nicholas J* said this with regard to a witness apparently contradicting himself or herself

"But the process [of identifying contradictions of previous statements] does not provide a rule of thumb for assessing the credibility of a witness. Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation, their number and importance and their bearing on the parts of the witness evidence."

A reading of the evidence by Tobias Chinyama reveals that he implicated both appellants. He indicated that while 2nd appellant negotiated with Sifakanye over the sale of the beats, 1st appellant whom he recalled as having worn on his apparel a ZCC church badge was controlling the cattle and doing the paper work. When he was quizzed during cross examination regarding his apparent ambivalence he attributed the same to the effluxion of time and the fact that the appellants' physical appearances had since changed.

Ultimately therefore, even if one were to view Sifakanye (and any or all of the state witnesses) as suspect witnesses there was sufficient corroboration to obviate the possibility of the false incrimination of the appellants.

The absence of certain documents

Much ado was made by both parties in this appeal about the apparent absence of some of the stock-clearance certificates and animal movement permits. The relevance of the latter documents is obscure in this appeal. More pertinently I do not quite comprehend how their absence would affect the evidence against the appellants given that it is common cause that the beasts must have somehow found their way from Mwenezi where they were stolen to Chiredzi where they were recovered.

What is also clear is that there was heavy tampering with police clearance certificates as typified by the fate of exhibit 6 (Mwenezi forms 392 with Serial Number 1226609) on it one

beast was cleared but when that same form was used to facilitate a subsequent clearance executed on exhibit 1 (Chiredzi Police Form 392 with serial number 1226364) it had miraculously "spawned" 15 additional beasts. The absence of the some of the clearance certificates and livestock movement permits does not in my view detract from the cogency of the evidence at the disposal of the court *a quo*.

The disputed invoices

Here, the appellants mounted a double-pronged attack on the probative value of the payment invoices. The first leg of the attack was that the appearance of their names and particulars of the varying invoices does not amount to much given that both Montana meats and Koala kept such particulars in their database from previous transactions. It was argued therefore all that was done was to retrieve such information to facilitate this masquerade.

The second leg of the attack was that in the absence of forensic evidence to confirm by means of disputed document analysis that it was the appellants who signed for the money, the convictions cannot stand.

Perhaps that argument would have availed the appellants had these two pieces of evidence been the only evidence against them. Not every matter turns on the availability of forensic evidence. Indeed, the bulk of criminal ones are resolved in the absence of forensic evidence.

Similarly, I do not see why both Montana meats and Koala meats would resort to the drastic subterfuge of retrieving appellants' pre-existing details in their database supposedly with a view of ensnaring them.

The court *a quo* was in my view correct in pointing out as it did in its reasons for judgement that it is not required of the state to close every avenue of escape for the accused and that fanciful and remote possibilities can be discounted.

A clear enunciation of the standard of proof required in a criminal trial is to be found in the words of Lord Denning who in his inimitable style said the following in the well-known case of *Miller v Minister of pensions* [1947] all ER 372 at 373

"...it need not reach certainly, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful probabilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the

least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice"

It was also contended in this appeal that the court *a quo* fell into error by neglecting to make a definitive pronouncement that the appellants' version was false. The state in this appeal weighed in support of this argument and indicated that the court *a quo* failed to make findings of credibility.

Findings of credibility are not necessarily found exclusively in the mouthing of those particular words, as same may be deduced from the contextual reading of the text of the judgement. An objective reading of the court *a quo*'s judgement reveals that it accepted the evidence of the state witnesses as credible although it did not employ those very words and rejected the version of the appellants.

In the final analysis therefore, there was no misdirection in the finding by the court *a quo* that the state had managed to prove its case against the appellants beyond reasonable doubt. The appeal against conviction is therefore dismissed.

Appeal against sentence

As indicated earlier, consequent to their conviction the appellants were each sentenced to a total of 63 years imprisonment (nine years for each of the seven counts in accordance with the mandatory minimum sentence prescribed in Section 114 (2) (e) of the criminal code). Of that total, 30 years were however suspended for 5 years on the usual conditions leaving an effective custodial sentence of 33 years' imprisonment.

The appellants in their appeal against sentence took issue with the failure by the court *a quo* to order the sentences in some of the counts to run concurrently with a view to ameliorating the severity of the overall sentence.

The general approach is that sentencing is pre-eminently in the discretion of the trial court and an appeal court can only interfere with such discretion upon a finding of a clear misdirection or irregularity on the part of the former. See *S v Mundowa* 1998 (2) ZLR 392 (H), *S v Mungwenhe & Another* 1991 (2) ZLR 66 and *S v Matanhire & others* HH 18/2003.

Where, as here, a person is convicted of two and more counts several options are available to the trial court in the treatment thereof for sentencing purposes. One such option is to

order that the punishment in respect of all or some of the counts to run concurrently. There must obviously be some rational basis for such treatment.

It can hardly be disputed that stock-theft remains a very serious offence. Apart from it constituting a wicked deprivation of complainant of the fruits of his or her hard work and investment, it also scuttles efforts at rebuilding the national head. The facts of this case also reveal that the offence was carefully planned and executed making the appellants' moral blameworthiness quite high.

However, the total sentence of 63 years imprisonment (albeit with 30 conditionally suspended) is undoubtedly severe. Although generally speaking the suspension of part of a sentence has the salutary effect of ameliorating the severity of the punishment one must disabuse oneself of the notion that such suspended portion must be disregarded or ignored when assessing the overall severity of the sentence. It remains an integral part of one sentence and carries the potential of being put into effect upon a breach of conditions of suspension.

The following are two comparable cases;

In *Collin Boka v The State HH 239-2010* the appellant was convicted of 9 counts of stock theft. The court below after grouping the counts into three categories for purposes of sentence and thereafter imposing a globular sentence for each such category ultimately imposed a cumulative sentence of 65 years' imprisonment. A total of 20 years was suspended on the usual conditions leaving the accused with a total effective sentence of 45 years' imprisonment. The appeal court overturned that sentence and treated all counts as one for sentence and imposed a sentence of 18 years' imprisonment with 5 years being conditionally suspended.

In *S v Zaranyika HB 660/10* which was a case for bail pending appeal, the High court per BHUNU J (as he then was) expressed the view that a sentence of 25 years' imprisonment was not inordinately harsh for the theft of 48 head of cattle.

In the present case it is not clear precisely when each of the counts were committed (for instance counts 1, 2 and 4 are all said to have been committed at Guramatunhu ranch, Mwenezi either in January 2014 or shortly thereafter). These particular counts were therefore closely connected in time and place justifying ordering the concurrent running of the sentences attending thereto. In light of the above I hold the view that there is merit in the appellant's contention (and state's concession) that the court *a quo* should have considered ordering the punishment for some

of the counts to run concurrently. Accordingly, the appeal against sentence should succeed to the extent that the 4 counts of stock theft committed at Guramatunhu ranch, Mwenezi (namely 1, 2 4 and 5) will be ordered to run concurrently. The remaining 3 counts (namely counts 6 and 7 which were committed at Mkume Ranch, Mwenezi and count 3 which was committed at Tokwe Chief Chitanga, Mwenezi) will similarly be ordered to run concurrently). In view of the said order for the concurrent running of sentences of the said counts there will be no need for a suspension of any part of the resultant sentence.

Ultimately therefore the following order is hereby made

ORDER

1. Appeal against conviction be and is hereby dismissed.
2. The appeal against sentence succeeds as follows:

The sentence imposed by the court *a quo* [wherein 9 years' imprisonment was imposed for each of the 7 counts (bringing the total to 63 years' imprisonment) of which 30 years' imprisonment was suspended for five years on condition appellants did not commit any offence involving stock-theft] is hereby set aside and substituted with the following:

- Each Appellant: Count 1- 9 years' imprisonment
- Count 2 - 9 years' imprisonment
- Count 3 - 9 years' imprisonment
- Count 4 - 9 years' imprisonment
- Count 5 - 9years' imprisonment
- Count 6 - 9 years' imprisonment
- Count 7 - 9 years' imprisonment

The sentences in Counts 1, 2, 4 and 5 are hereby ordered to run concurrently and the sentences in counts 3, 6 &7 are ordered to run concurrently.

Effective sentence: 18 years' imprisonment.

ZISENGWE J.....

MAWADZE J agrees.....

*Ndlovu and Hwacha legal practitioners; Appellants' legal practitioners
National Prosecuting Authority; Respondent's Legal practitioners*