

THE STATE
versus
CLEMENT SIBANDA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 29 SEPTEMBER 2016

Criminal Review

MATHONSI J: The accused person, a 42 year old man residing at number 2094 Old Pumula Bulawayo is a repeat offender, a pathological stock thief in the habit of regularly making forays into Esigodini, a rural farming area some 40 kilometres out of Bulawayo, to steal goats.

On 26 June 2015 he was arraigned before a magistrate at Esigodini on a charge of stock theft. He was convicted and sentenced to 90 days imprisonment. On 9 September 2015 he again appeared before the same court on the same charge. He was sentenced to 18 months imprisonment of which 6 months imprisonment was suspended for 5 years;

“on condition that he does not, within that period commit any offence that has dishonesty as an element of which upon conviction accused will be sentenced to a custodial term without the option of a fine.”

Whatever caused his early release from custody allowed him to again return to Esigodini on 3 August 2016. At Esihlengeni grazing area he stole one goat valued at \$50-00 belonging to Jolo Mangena. The facts are that he put up a snare, rounded up the goats and drove them in the direction of his snare. When one white goat was caught the accused person promptly slaughtered it. He was arrested by members of the public who found him skinning the goat.

When he appeared before a magistrate the following day on 4 August 2016 he was quick to plead guilty to the charge of stock theft in contravention of s114 of the Criminal Law Code [Chapter 9:23]. He was sentenced to 24 months imprisonment of which 8 months imprisonment was suspended on condition he compensates the complainant in the sum of \$50-00 on or before 31 October 2016. The 6 months imprisonment suspended on 9 September 2015 was further

suspended on the same conditions. This left the accused to serve an effective 16 months imprisonment.

What caused me some disquiet was the further suspension of the 6 months imprisonment which had been suspended on 9 September 2015 on condition of future good behaviour. I then desired to know from the trial magistrate why that was so. In his response dated 6 September 2016 the learned trial magistrate stated;

“RE: REVIEW MINUTE: THE STATE VERSUS CLEMENT SIBANDA CRB ESG 283/16

Please place the attached minute before the reviewing judge with the following comments.

The current conviction does amount to a breach of the conditions of suspension in the previous case. In this particular case I did not bring into effect the 6 months that was suspended in the previous case as I felt the effective sentence was sufficient to meet the justice of the case. The accused though a repeat offender, still need(s) to be deterred from committing similar offences. The sentence was further suspended to act as deterrence. Bringing the suspended sentence into effect would in this case have made the sentence to be severe. An effective sentence of 16 months for theft (of) a goat valued at \$50 was viewed to meet the justice of this case. I stand guided.”

The question which arises is whether the court had the power to further suspend a sentence suspended previously on certain conditions where the conditions for suspension had been breached. I think not. It is difficult to appreciate why the magistrate found himself having to moralise about the appropriateness of the sentence he preferred when he had a sentencing discretion unfettered by what normally afflicts criminal courts, a mandatory sentence which ties down the court to a minimum sentence because a statute says so.

The stock theft in question did not involve a bovine or equine animal which would involve the imposition of a mandatory minimum sentence of 9 years if the court found no special circumstances in terms of s114 (2) (e) of the Act. The accused should have been sentenced in terms of paragraph (f) of subsection (2) of s114, that is, to a fine not exceeding level 14 or twice the value of the stolen property whichever is greater or to imprisonment for a period not exceeding 25 years or both.

Clearly therefore the trial magistrate had a discretion and in the exercise of that discretion he imposed a term of imprisonment without the option of a fine. He cannot therefore at the same time be heard to complain that the accused person did not deserve what was coming to him. He cannot possibly have his cake and then eat it at the same time.

A sentencing court can only suspend a suspended sentence as provided for in s358 of the Criminal Procedure and Evidence Act [Chapter 9:07]. Subsection (2) of that section empowers the sentencing court to suspend the operation of the sentence passed for a period not exceeding 5 years on certain conditions most of which are set out in subsection (3) and include good conduct.

Where a person has violated a condition of suspension of a sentence like the failure to pay a fine or any instalment thereof, the court may order that the offender be brought before it in terms of subsection (5) for purposes of subsection (7). The latter provides:

“When the offender is brought before the court in accordance with an order made in terms of subsection (5) the court may commit him to undergo the sentence which may then be or has been lawfully passed or, in its discretion, the reasons whereof shall be recorded on good cause shown by the offender—

- (a) grant a further postponement or suspension, as the case may be, for a further period not exceeding five years where the original postponement or suspension was in terms of paragraph (c) of subsection (2) subject to such conditions as might have been imposed at the time of the original postponement or suspension; or
- (b) in the case of a postponement or suspension in terms of paragraph (a) or (b) of subsection (2), refuse to pass sentence or bring the suspended sentence into operation as the case may be.”

It appears to me that the discretion of the court to grant a further suspension of a suspended sentence is triggered only where it has ordered the offender to be brought before it in terms of subsection (5) of s358. An offender is only brought before the court that way where his or her contravention of the condition of suspension has been brought to the attention of the court which then orders the offender to be brought before it.

In my view, where the offender is tried and convicted of a different or fresh charge and the sentence of the court for that different or fresh charge brings about the violation of a suspended sentence, the court has no such discretion. A court would have suspended the operation of a sentence on condition, as in the present case, that the beneficiary of such

suspension is not during the period in question, convicted of an offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

A conviction during the currency of that period resulting in a sentence of imprisonment without the option of a fine amounts to a breach of the condition of suspension. Having violated the condition of suspension, the accused person lost the benefit of the suspension. The suspended sentence had to be brought into effect. The court was not at liberty to further suspend the suspended sentence whose condition of suspension had been violated by bad behaviour.

Any other construction would not make sense. In any event allowing a different court to further suspend the sentence whose condition of suspension would have been violated would, in my view, amount to an undesirable interference with the sentencing discretion of another court.

Therefore the moment the trial magistrate settled for imprisonment without the option of a fine, he fettered his discretion. He could no longer influence the implementation of the previously suspended sentence. It had to be brought into effect. I conclude therefore that in doing so, the trial magistrate misdirected himself. While there is no basis for interfering with the conviction, there is need to interfere with the sentence by bringing into effect the sentence suspended on on 9 September 2015.

In the result, it is ordered that:

1. The conviction of the accused person is hereby confirmed.
2. The sentence is also confirmed except for the further suspension of the 6 months imprisonment in CRB ESG 324/15 which is hereby set aside and substituted with the following:

“In addition the 6 months imprisonment suspended on 9 September 2015 in CRB ESG 324/15 is hereby brought into effect.”

Mathonsi J.....

Moyo J agrees.....