HB 143/17
HCA 97/16

MTHOKOZISI MHLOPHE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & MATHONSI JJ
BULAWAYO 5 & 8 JUNE 2017

Criminal Appeal

Ms P. Mvundla for the appellant
Ms S. Ndlovu for the respondent

MATHONSI J: The 41 year old appellant appeared before a magistrate at Esigodini on 29 September 2015 charged with stock theft in breach of s114 of the Criminal Law Code [Chapter 9:23]. Himself and an accomplice had, on 20 September 2015 unpenned 4 head of cattle belonging to Samkeliso Nyoni at Khomani Village, Esigodini and driven them away. He was apprehended the following day and all the cattle were recovered.

The appellant pleaded guilty to the charge and when the court found no special circumstances it sentenced him to an effective 15 years imprisonment.

He has appealed against sentence on the grounds that, in light of the mitigating factors present, the court should have suspended part of the sentence above the minimum mandatory sentence of 9 years provided for in the penal provision of s114. Failure to do so meant that the court paid lip service to the mitigating factors.

The appeal is strongly opposed by the state which sees nothing wrong with the sentence which, in any event, is the discretion of the trial court which discretion the appeal court will not interfere with unless there is a misdirection. Ms *Ndlovu* for the state submitted that ideally each beast should attract the mandatory minimum sentence of 9 years imprisonment. Therefore there was nothing wrong with 15 years imprisonment the trial court settled for. I do not agree.

The minimum sentence of 9 years imprisonment is in respect of each count of stock theft and not each beast stolen. It means therefore that given the fact that the appellant was convicted of one count of theft of 4 head of cattle the minimum sentence allowed by the Act is 9 years while the maximum is 25 years. Therefore the sentencing discretion of the court in the circumstances was up to 25 years but not less than 9 years imprisonment. The appeal court will only interfere with that discretion where there is a misdirection or the sentence is manifestly excessive. See *S* v *Chiweshe* 1996 (1) ZLR 425 (H). Ms *Mvundla* for the appellant submitted that although the court had no choice but to impose the minimum of 9 years imprisonment it had the discretion taking into account the weighty mitigatory circumstances which exist in this matter to suspend a portion of the rest of the sentence in recognition of the fact that the appellant is a first offender who pleaded guilty to the charge and was therefore not only contrite, he also did not waste the court's time. I agree.

There can be no doubt that remorsefulness and a guilty plea are strong mitigatory factors. See generally G. Feltoe, *A Guide to Sentencing in Zimbabwe*, LRF, 2009. It has often been said that judicial officers have this habit of failing to take into account factors of mitigation in assessing sentence even where they list those factors. Invariably they pay lip service to the mitigatory factors; *S* v *Madembo & Anor* 2003 (1) ZLR 137.

As stated by EBRAHIM JA in *S* v *Buka* 1995 (2) ZLR 130 (S) at 134G, 135A;

> "It is my view, however, that judicial officers do not give sufficient weight to where an accused person tenders a plea of guilty to a charge levelled against them. It is important not to merely pay lip service by repeating what one is expected to say when a plea of guilty has been tendered. One often reads in a judgment the following: 'I have taken into account that you have pleaded guilty, that you are a first offender and that you have expressed contrition'. It is not enough to repeat these phrases without giving due weight to the plea proffered. They are factors of mitigation and judicial officers should take proper account of them."

See also *S* v *Katsaura* 1997 (2) ZLR 102 (H); *S* v *Sidat* 1997 (1) ZLR 487.

In my view it is meaningless to merely pay homage to these mitigatory factors and thereafter go on to punctuate them, as judicial officers quite often do, with the dreaded

expression: "However, this is a very serious offence." Once that is said all the mitigating factors are thrown out through the window and the sentencer proceeds to impose a sentence so harsh that one is left with no doubt whatsoever that the weighty mitigation was forgotten. A meaningful difference must always appear in the final sentence imposed to show that the mitigation had an effect. It is for that reason that DEVITTIE J in *S* v *Munechawo* 1998 (1) ZLR 129 (H) preferred that the sentencer should specifically make a pronouncement of a discount in the sentence to take into account the mitigation.

In the present case there can be no doubt that the appellant committed a very serious offence. He stole 4 head of cattle. He was however charged with one count, calling for a minimum mandatory sentence of 9 years. All the cattle were recovered and therefore there was no prejudice suffered.

In my view this is a case in which a certain portion of the sentence should have been suspended because the appellant was a first offender who tendered a guilty plea. Although the court was encumbered by the mandatory minimum sentence, it should have used its sentencing discretion in respect of the rest of the sentence regard being had to the fact that the mandatory 9 years is hefty on its own.

In the result, it is ordered that:

1. The appeal against sentence is hereby upheld.
2. The sentence of the court *a quo* is set side and substituted with the following sentence.
   "15 years imprisonment of which 4 years imprisonment is suspended for 5 years on condition the appellant does not, during that period commit any offence involving stock theft for which, upon conviction, he is sentenced to imprisonment without the option of a fine.
   Effective sentence: 11 years"

Bere J …….. I agree

Mutuso, Taruvinga & Mhiridi Attorneys, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners